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In The

Supreme Court of the United States

October Term, 1990

YELLOW FREIGHT SYSTEM, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

JEFFREY IVAN PASEK
(Counsel of record)
COHEN, SHAPIRO, POLISHER,
SHIEKMAN AND COHEN
PSFS Building, 24th Floor
12 South 12th Street
Philadelphia, PA 19107
(215) 922-1300

Attorneys for Petitioner

Of Counsel:

HOWARD LESNICK
3400 Chestnut Street
Philadelphia, PA 19104

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether, because the National Labor Relations Board is termed an "agency" rather than a "court," the United States Courts of Appeals, when reviewing Board decisions, are exempt from the requirement of 28 U.S.C. Section 1738 to give "full faith and credit" to State court judgments.

Whether the NLRB is similarly exempt.

Whether, by reason of Section 10(a) of the National Labor Relations Act, the NLRB is also exempt from federal common law principles of issue preclusion, except as they are reflected in the Board's discretionary "deferral" rules.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Statutes Involved 2

Statement of the Case 3

Reasons for Allowance of the Writ 9

A. The decision below, that the Court of Appeals in reviewing decisions of the National Labor Relations Board is not subject to the mandate of 28 U.S.C. Section 1738, because the Board is termed an "agency" rather than a "court," is in conflict with a decision of the Court of Appeals for the Eighth Circuit, and presents an important issue of federal law that should be resolved by this Court 9

B. The decision below, that the National Labor Relations Board is not subject to the mandate of 28 U.S.C. Section 1738, because it is termed an "agency" rather than a "court," is in conflict with the settled judicial practice of this and other courts, and presents an important issue of federal law that should be resolved by this Court 13

C. The decision below, that the principles of common law preclusion do not govern NLRB proceedings independently of the Board's discretionary deferral rules, presents an important issue of federal law that has not been, but should be, resolved by this Court 21

Conclusion 30

TABLE OF CONTENTS – Continued

Page

Appendix Table of Contents:

1. United States Court of Appeals for the Third Circuit Opinion filed April 11, 1991 ..... A-1
2. National Labor Relations Board Decision and Order dated November 21, 1989 ..... A-18
3. Administrative Law Judge Decision dated May 18, 1989 ..... A-20
4. Superior Court of New Jersey Order and Judgment filed February 10, 1989 ..... A-44
5. Award of Arbitrator Daniel F. Brent dated August 11, 1988 ..... A-47

TABLE OF AUTHORITIES

Page

CASES

Algoma v. Plywood & Veneer Co. v. NLRB, 336 U.S. 301 (1949) 24

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 22

Allen v. McCurry, 449 U.S. 90 (1980) 10, 11, 21

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) 22

Bennett v. Schweiker, 532 F. Supp. 837 (D.D.C. 1982) 12

Blair v. Oesterlein Machine Co., 275 U.S. 220 (1927) 17

Botz v. Helvering, 134 F.2d 538 (8th Cir. 1943) 13, 20

Caldeira v. County of Kauai, 866 F.2d 1175 (9th Cir. 1989) 24

Chisholm v. Defense Logistics Agency, 656 F.2d 42 (3d Cir. 1981) 26

Commissioner v. Gooch Milling & Elevator Co., 320 U.S. 418 (1943) 17

Crowell v. Benson, 285 U.S. 22 (1932) 18

Evans v. Asphalt Roads & Materials Co., 194 Va. 165, 72 S.E. 2d 321 (1952) 14, 20

Ex parte Bakelite Corp., 279 U.S. 438 (1929) 16

Gilmer v. Interstate/Johnson Lane Corp., ___ U.S. ___, 111 S.Ct. 1647 (1991) 22

Gorin v. Osborne, 756 F.2d 834 (11th Cir. 1985) 24

Industrial Commission v. McCartin, 330 U.S. 622 (1947) 14

TABLE OF AUTHORITIES – Continued

Page

International Union of Mine Workers v. Eagle-Pitcher Mining & Smelting, 325 U.S. 335 (1945) 26

Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) 11, 21, 24

Local 560, IBT v. Eazor Express, Inc., 95 N.J. Super 219, 230 A.2d 521 (App. Div. 1967) 28

Local 153, OPEIU v. Trust Co. of New Jersey, 105 N.J. 442, 522 A.2d 992 (1987) 28

Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 25

Magnolia Petroleum v. Hunt, 300 U.S. 430 (1943) 14

Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985) 20

Martin Rush, Urology Associates, P.A. v. Kuhn, Smith & Harris, 193 N.J. Super. 389, 474 A.2d 1072 (1984) 10

McDonald v. City of West Branch, 466 U.S. 284 (1984) 22

NLRB v. Donna Lee Sportswear Co., Inc., 836 F.2d 31 (1st Cir. 1987) 10

NLRB v. Heyman, 541 F.2d 796 (9th Cir. 1976) 10, 24, 26

NLRB v. Yellow Freight System, Inc., 930 F.2d 316 (3d Cir. 1991) ..... *passim*

Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929) 16

Parsons Steel Inc. v. First Alabama Bank, 474 U.S. 518 (1986) 21

TABLE OF AUTHORITIES – Continued

Page

Penntech Papers, Inc. v. NLRB, 706 F.2d 18 (1st Cir. 1983) 10

Prentice v. Atlantic Coast Line Co., 211 U.S. 210 (1908) 19, 20

Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) 14, 20

The Young Engineers, Inc. v. United States International Trade Commission, 721 F.2d 1305 (Fed. Cir. 1983) 26

United Paperworkers v. Misco, 484 U.S. 29 (1987) 25

United States v. Allen, 27 M.J. 234 (Ct. Mil. App. 1988) 19

United States v. Stauffer Chemical Co., 464 U.S. 165 (1984) 20

United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) 25

University of Tennessee v. Elliott, 478 U.S. 788 (1986) 15, 21, 22

STATUTES

10 U.S.C. § 867 19

15 U.S.C. § 45(g) 12

15 U.S.C. § 45(g)(1) 12

26 U.S.C. § 7441 17

28 U.S.C. § 251 16

28 U.S.C. § 451 15

28 U.S.C. § 1254(1) 2

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1738 ..... *passim*

28 U.S.C. § 1739 12

28 U.S.C. § 2283 19

29 U.S.C. § 153(a) 18

29 U.S.C. § 158(a)(1) 3

29 U.S.C. § 158(a)(3) 3

29 U.S.C. § 160(a) 21, 24

29 U.S.C. § 160(e) 3, 12

29 U.S.C. § 173(d) 25

29 U.S.C. § 185(a) 25

43 Stat. 338, § 900(k) 16

56 Stat. 957, § 504(a) 16

2A N.J.S.A. § 24-10 ..... 2, 10

OTHER AUTHORITIES

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House Report No. 1 on H.R.1, 69th Cong., 1st Sess. 20 (1926) 17

Internal Revenue Code of 1939 § 1100 16

L. Jaffe, *Judicial Control Of Administrative Action* 87 (1965) 18

14 Mertens, *Law of Federal Income Taxation* 50.09 (1991) 17

TABLE OF AUTHORITIES – Continued

Page

93 Cong. Rec. 8388 (1947) 17

1B Moore, *Federal Practice* 728-29 (2d ed. 1988) 28

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13 Wright, Miller & Cooper, *Federal Practice & Procedure* 35 (2d ed. 1984) 17

13 Wright, Miller & Cooper, *Federal Practice & Procedure* 37-38 (2d ed. 1984) 19

18 Wright, Miller & Cooper, *Federal Practice & Procedure* 216 (1981) 28

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Yellow Freight System, Inc., petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Third Circuit.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (reprinted in the Appendix to this Petition, pp. A. 1-16)[2] is reported at 930 F.2d 316. The

[1] Petitioner is a wholly owned subsidiary of Yellow Freight System, Inc. of Delaware.

[2] Page references with the prefix "A" are to pages of the Appendix to this Petition. References with the prefix "R" are to pages of the Record filed in the Court of Appeals.

opinions of the National Labor Relations Board and its Administrative Law Judge (A. 17-30) are reported at 297 N.L.R.B. No. 50 (1989).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on April 11, 1991.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

1. 28 U.S.C. Section 1738 (the "Full Faith and Credit" Statute) provides as follows:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

2. 2A N.J.S.A. Section 24-10 provides as follows:

> The judgment confirming, modifying or correcting an award or a judgment in any action under this chapter shall have the same effect, in

all respects, as, and is subject to all the provisions of law relating to, a judgment in any other action and may be enforced as if rendered in any other action in the court in which it is entered.

STATEMENT OF THE CASE

This proceeding was initiated by a charge of unfair labor practice filed by Lonnie Bedell, alleging that he was discharged from employment by Petitioner in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("the NLRA" or "the Act"), 29 U.S.C. Sections 158(a)(1) and 158(a)(3). Following issuance of a complaint, a hearing and a decision by an Administrative Law Judge, the National Labor Relations Board (the "NLRB" or "the Board") upheld the complaint, and ordered Petitioner to reinstate Bedell with back pay. On petition for enforcement, the United States Court of Appeals for the Third Circuit enforced the Board's order. The jurisdiction of the Court of Appeals rested on Section 10(e) of the NLRA, 29 U.S.C. Section 160(e).

Bedell had been employed as a dockman at Petitioner's Elizabeth, N.J., terminal. (R. 0420). On February 3, 1988, he was discharged, on the grounds that a few minutes earlier he had refused to comply with a direct work order and had "verbally assaulted" Joseph Smidt, a supervisor. (R. 0421). (Article 47, Section 2 of the applicable collective bargaining agreement specifies "assault on Employer or his representative during working hours" as one of the "causes for discharge". R. 0494). The union grieved the discharge, denying that any refusal or assault had occurred (R. 0487), and the matter was submitted to arbitration under the auspices of the State Board of Mediation. (R. 0484, 0486).

The arbitral proceeding

At the arbitral hearing, Bedell and his union, which supported his claim, were represented by counsel. (R. 0422, 0487). There were two days of hearings, at which the parties enjoyed the right to present sworn testimony, obtain access to relevant documents, cross-examine adverse witnesses, and offer arguments. A verbatim transcript, comprising over 400 pages, was prepared. (R. 0486).

On August 11, 1988, the arbitrator issued an award upholding the discharge. Noting that the parties' versions of the critical events "differ[ed] greatly from each other," the arbitrator concluded, first, that the evidence "clearly and convincingly" established that the language used by Bedell toward Smidt, in light of the "tone and tenor of his invective," exceeded the boundaries of acceptable "shop talk." (A. 50). Second, although "such cursing alone" would not justify discharge, the arbitrator rejected the position, strongly urged in support of the grievance (A. 49, R. 0389), that the contractual prohibition on an "assault" could not apply to a "verbal assault." "The ambience of the interaction and the grievant's seething anger gave particular meaning to his aggressive stance toward the supervisor;" Bedell's "physical action toward his supervisor plac[ing] the supervisor in reasonable fear of imminent hostile touching, . . . when viewed in combination with the loud and angry words spoken," did constitute an assault within the meaning of the collective agreement, and warranted discharge. (A. 50-51).[3]

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[3] The arbitrator specifically found as follows:

> The credible testimony established that, after cursing at his supervisor the grievant made menacing movements towards the supervisor with raised and moving arms. The supervisor described in a straightforward, credible manner the fiendish look in

(Continued on following page)

As noted above, the testimony was in conflict on several critical issues, and determination of the witnesses' credibility was a major question for the arbitrator to decide; as counsel for the grievants summed it up, "the whole case hinges on credibility." (R. 0404). In light of the subsequent proceedings, it is especially important to bear concretely in mind the manner in which the credibility issue was litigated in arbitration. In addition to placing the usual reliance on traditional indicia of credibility – demeanor, opportunity to observe, etc., (R. 0391-94, 0396-98, R. 0402) – counsel for the grievants emphasized that the difference between Smidt's and Bedell's physical appearance – the supervisor was 6'2", 260 lbs, and an accomplished practitioner of martial arts (R. 0066-67); Bedell was 5'10", and 180 lbs "soaking wet" (R. 0395) – implied that Smidt could not have been placed in "reasonable fear." In response, Smidt explained that several people had seen Bedell carrying a gun and that, at least once, he had threatened someone (R. 0069). Counsel for the grievants presented witnesses contradicting this reputation testimony (R. 0307, 0373, 0375) and characterized Smidt's testimony on this point as a "fabrication."

(Continued from previous page)

> the grievant's eyes, from which the supervisor concluded that the grievant was out of control. Whether an actual battery would have occurred is speculative, because another employee intervened [and because of] the hasty retreat of the supervisor. . . .
>
> . . . . In summary, verbal abuse alone might not be sufficient to sustain a discharge, but the grievant's loud angry cursing at a supervisor, in combination with his aggressive approach toward his supervisor, constituted an assault. Although insubordination may not justify summary discharge, an assault on a supervisor will. The collective bargaining agreement is clear and unambiguous with regard to an assault on management. . . .

(A. 51-53).

(R. 0399). Finally, Bedell suggested that Smidt had been singling him out for onerous work assignments (R. 0349), a suggestion that company counsel sought to undermine on the ground that Bedell had not filed a grievance in response. (R. 0412-14).

In that latter connection, what counsel for the grievants made a decision *not* to do is an essential part of the facts of the case. Several weeks prior to his discharge, Bedell had filed charges with the United States Equal Employment Opportunity Commission ("EEOC"), alleging that Petitioner had engaged in a series of acts of discriminatory worsening of his working conditions in retaliation for his having assisted another employee to file charges concerning her own treatment. (These are described at some length at the outset of the Court of Appeals opinion, A. 3-4, 930 F.2d at 317). Following his discharge, Bedell filed a second complaint with EEOC, alleging that the discharge too was a retaliatory act. At the arbitral hearing, counsel for the grievants advised the arbitrator that the hearing would be limited "to only the contractual just cause question." (R. 0017). However, he did not elect merely to decline to litigate in arbitration the question of the alleged violation of statute. Although acknowledging that the EEOC charges were "related to the discharge" (R. 0018), he elected as well to decline to use any of the factual material relating to alleged discriminatory acts done prior to the day of Bedell's discharge, in support of his effort to undermine the credibility of the company's witnesses with respect to the assault.

Following the arbitrator's decision, Bedell and his union filed suit in the Superior Court of New Jersey to vacate the award, specifically alleging that it was "without foundation in reason or fact and in direct contradiction to the provision of the Collective Bargaining Agreement." (R. 0495). On February 10, 1989, the court dismissed "with prejudice" the action to vacate, and granted Petitioner's counterclaim seeking a judgment confirming the award. (A. 44-46). Bedell and the union

each elected not to seek review of this decision in the New Jersey Supreme Court.

The Labor Board Proceeding

Bedell had filed a charge with the Regional Director, NLRB, asserting that the activities that allegedly motivated his discharge were also protected by the NLRA. Following issuance of a complaint, the General Counsel, on behalf of Bedell, sought to prove, not only that the assault was not the motive for the discharge, but that Bedell had not assaulted Smidt at all, and that Petitioner had "contrived the account" (A. 31) in order to supply a colorable ground for an unlawfully motivated discharge. During four days of hearings, testimony was taken filling some 900 pages of transcript, of which 766 were devoted to the testimony of seven witnesses who had testified previously at the arbitral hearing.

The Administrative Law Judge "discredited" the testimony of Petitioner's witnesses that Bedell had acted "in a threatening manner." (A. 35). Contrary to the arbitrator on each point, he relied heavily on the disparity in size; disbelieved the testimony about the gun; and found Smidt an unpersuasive witness, on both circumstantial and demeanor grounds. (A. 32). On the basis of these credibility determinations, he found that the reason given for the discharge was not only not the actual motive for it, but that it was a "spurious," that is, a fabricated reason, and that its proffer was part of the General Counsel's *prima facie* case. (A. 35). He refused to give any credit to the findings of the arbitrator or the Superior Court, on the ground that the issue of motivation "was not presented to the arbitrator." (A. 38). The arbitrator's resolution of the credibility issues bearing on his finding that the assault did in fact occur was, the ALJ reasoned, similarly not entitled to be credited because it was "necessarily enmeshed" with evidence that had not been presented previously. (A. 39).

Petitioner specifically contended that both 28 U.S.C. Section 1738 and federal common law forbade such casual disregard of the "specific factual determinations" made in the arbitral proceedings (R. 0505-10). The Board rejected this contention without discussion, noting, however, that the Administrative Law Judge's conclusion not to credit Smidt's claim that Bedell had "behaved in a threatening manner" was based on "Smidt's evasive demeanor while testifying" at the second hearing. (A. 19).

In opposing the Board's enforcement petition in the Court of Appeals, Petitioner emphasized its agreement that judicial confirmation of the arbitral decision does not preclude the Regional Director from attempting to establish a discriminatory motive for the discharge. What is precluded, Petitioner asserted, is disregard of the arbitral finding that the assault in fact occurred. Put simply, Petitioner's contention was one of issue preclusion, but not of claim preclusion. In addition to relying on both statutory and common-law preclusion, Petitioner argued that substantive labor law principles, properly applied, required the Board to apply its deferral rules to this proceeding – again, only to bar relitigation of the single issue of the existence of the assault.

Counsel for the Board conceded that "the facts presented to the arbitrator certainly permitted him to credit the testimony that an assault occurred" (Court of Appeals Brief, p. 22), but contended that the Board was nonetheless free to relitigate that question because evidence *not* presented to the arbitrator might have "alerted him to the possibility that the same hostility towards Bedell's protected activity motivated the Company's accusation of assault." (*Ibid*). The Board argued that neither 28 U.S.C. Section 1738 nor common-law preclusion limits the Board's discretionary deferral principles.

The Court of Appeals, in enforcing the Board's order, rested on three mutually reinforcing bases for giving narrower, rather than broader, scope to the principles of full faith and credit:

First, the Court held that Section 1738 does not bind the Board because it is not a "court." Although the Court justified this ruling on the ground that "the directive of Section 1738 has been literally applied" (A. 9, 930 F.2d at 320), it went on to dismiss Petitioner's reliance on the fact that the Court of Appeals itself is unquestionably a "court," plainly bound by Section 1738, as leading to an "anomalous" result. (A. 11, 930 F.2d at 320).

Second, having set aside the statute, the Court of Appeals treated the question of common-law preclusion as wholly subsumed within that of labor-law deferral and held that, since the Board had consistently applied its deferral rules, the decision was within the Board's discretion. (A. 12-16, 930 F.2d at 321-22).

Third, the Court held that neither common-law preclusion nor NLRA deferral is applicable where evidence not presented to the arbitrator might have persuaded him to rule differently on the credibility issues affecting resolution of the grievance. (A. 15-16, 930 F.2d at 322).

REASONS FOR ALLOWANCE OF THE WRIT

A. The decision below, that the Court of Appeals in reviewing decisions of the National Labor Relations Board is not subject to the mandate of 28 U.S.C. Section 1738, because the Board is termed an "agency" rather than a "court," is in conflict with a decision of the Court of Appeals for the Eighth Circuit, and presents an important issue of federal law that should be resolved by this Court.

Section 1738 of the Judicial Code provides in relevant part as follows:

> The records and judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.

By this statute, the successor to one enacted over 200 years ago, "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so. . . . " *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Neither the Board nor the Court of Appeals has questioned Petitioner's assertion that, by the law of New Jersey, the decision of the Superior Court confirming the arbitral award estops Bedell and those in privity with him from relitigating the question whether he assaulted his supervisor, Joseph Smidt.[4] Moreover, the Court of Appeals cited approvingly (A. 13, 930 F.2d at 321) decisions of other Circuits holding that, where Board proceedings are triggered by a charge filed by a person or organization that had previously suffered an adverse decision in a litigated proceeding against the respondent, the General Counsel is in "privity" with the charging party, so as to make applicable the law of issue preclusion.[5]

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[4] The judgment confirming an [arbitration] award . . . shall have the same effect, in all respects as, and is subject to all the provisions of law relating to, a judgment in any other action and may be enforced as if rendered in any other action in the court in which it is enforced.

24 N.J.S.A. Sec. 24-10. See also Martin Rush, Urology Associates, P.A. v. Kuhn, Smith & Harris, 193 N.J. Super. 389, 395, 474 A.2d 1072, 1075 (1984):

> When part of an entire controversy has been decided in arbitration and part remains to be decided in court, applying the collateral estoppel doctrine would be a major step toward eliminating wasteful and debilitating litigation of issues in court that have already been decided in arbitration.

[5] NLRB v. Heyman, 541 F.2d 796, 799 (9th Cir. 1976); NLRB v. Donna-Lee Sportswear Co., Inc., 836 F.2d 31 (1st Cir. 1987). See also, to like effect (although holding that the requisite identity of issues was lacking), Penntech Papers, Inc. v. NLRB, 706 F.2d 18, 23 (1st Cir. 1983).

"[T]his Court has consistently emphasized the importance of the related doctrines of res judicata and collateral estoppel in fulfilling the purpose for which civil courts had been established, the conclusive resolution of disputes within their jurisdiction." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 n.6 (1982). In light of this principle, the decision below far too casually dismissed the applicability of Section 1738.

The Court of Appeals held the Board exempt because "the directive of section 1738 has been literally applied" (A. 9, 930 F.2d at 320), and does not bind any tribunal not termed a "court." But, if that is so, may the same directive be selectively disregarded, so as *not* to bind a tribunal that is unquestionably a "court"? The statute is hardly being "literally applied" when it is held not to apply to the Court of Appeals itself on the ground (A. 11, 930 F.2d at 320) that it would be "anomalous" for the Court of Appeals to respect the mandate, because it would be "forcing" the Board to do what the statute does not require in order to obtain judicial enforcement of its decisions. Congress has explicitly mandated the Courts of Appeals to give full faith and credit to the judgments of State courts; see the reference in *Allen v. McCurry*, *supra*, to "all federal courts." The inapplicability of the statute to administrative agencies, even if held to exist, cannot be thought to reflect an affirmative legislative intention to *exempt* them from the strictures of full faith and credit.[6] If, as a result of the stricture imposed on reviewing courts, the Labor Board were to adopt the practice of giving full faith and credit to State court decisions, no statutory command is violated.[7] Any perceived "anomaly" is for

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[6] Compare the Board's "implied repeal" argument, p. 20 n.18, *infra*.

[7] Even on its own terms, the Court of Appeals exaggerated the consequences of a decision to give Section 1738 a consistently literal interpretation. The Board would be free to

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Congress to resolve, and to decide whether to do so by broadening or by narrowing the reach of the statute.[8]

It should be borne in mind that Congress has quite advertantly refused to require litigants to comply with Board orders, declining even to place on unsuccessful respondents desiring to challenge a Board order the obligation to seek judicial review. By reason of the explicit provisions of Section 10(e) of the Act, 29 U.S.C. Section 160(e), the General Counsel has the burden of seeking and obtaining a judicial enforcement order before any obligation to comply with a Board decision arises. Compare the treatment of the Federal Trade Commission, 15 U.S.C. Section 45(g).[9]

The decision of the Court of Appeals that it is exempt from the requirement of Section 1738 is in direct conflict with the articulated premise of the decision of the Court

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continue to make, and to have enforced, factual determinations without regard to the statutory requirement of full faith and credit, in those cases in which substantial evidence otherwise existed to support the result.

[8] Indeed, the terms of 28 U.S.C. Sec. 1739, a companion provision to Sec. 1738, applicable to "every court and office within the United States," plainly require the Board to give full faith and credit to the "nonjudicial records" of any State "public office." See *e.g.*, Bennett v. Schweiker, 532 F. Supp. 837, 839-40 (D.D.C. 1982) (birth certificate). The "record" in question, though nonjudicial, could well embody the resolution of a contested matter, and if there is an "anomaly" it is that the records of a State office of "vital statistics" bind the Board, but those of its Superior Court do not, and that the Superior Court decision in the case at bar would bind a Court of Appeals reviewing a District Court judgment, but not that of the NLRB.

[9] "An order of the Commission to cease and desist shall become final . . . upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time." 15 U.S.C. Sec. 45(g)(1).

of Appeals for the Eighth Circuit in *Botz v. Helvering*, 134 F.2d 538 (8th Cir. 1943). The question in that case concerned the effect of the judgment of a Missouri court in a tax deficiency proceeding before the Board of Tax Appeals. The Court of Appeals needed only to quote the language of the predecessor of Section 1738 to draw the inference: "Therefore our inquiry is as to what effect would be accorded to these judgments in Missouri courts." *Id.* at 544. Whether the court thought the Board similarly bound is not clear from the opinion, but what is clear is that the court saw nothing "anomalous" in recognizing that, whatever the case as to the Board, the statute was unmistakably addressed to it.

The self-contradictory nature of the Court of Appeals' reasoning, its failure to give effect to the undeniably applicable language of this important statute, and the direct conflict with the approach of the Eighth Circuit decision in *Botz*, make the decision below an appropriate one for review by this Court on certiorari.[10]

B. The decision below, that the National Labor Relations Board is not subject to the mandate of 28 U.S.C. Section 1738, because it is termed an "agency" rather than a "court," is in conflict with the settled judicial practice of this and other courts, and presents an important issue of federal law that should be resolved by this Court.

The decision of the Court of Appeals that the Board itself is exempt from statutory preclusion is inconsistent

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[10] The fact that review of Board findings of fact is limited to the determination whether "substantial evidence" exists to support the findings does not provide a basis for escaping the mandate of Section 1738. Petitioner specifically argued to the Court of Appeals that, on the assumption that the assault did in fact occur, there was no substantial evidence to support the Board order. The Court of Appeals did not rule on this contention. (A. 16 n.4, 930 F.2d at 322 n.4.)

with the long-standing practice of this and other courts, is based on an improper reading of this Court's precedents, and fails to supply a workable rationale by which the scope of Section 1738 can be judged. These failings provide an independent basis for granting review.

Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980), reviewed the decision of a federal agency, the Benefits Review Board, awarding workers' compensation benefits under the District of Columbia Workmen's Compensation Act, as against a claim that full faith and credit was denied the prior award of benefits under the Virginia statute. As the Court recognized, 448 U.S. at 266 n.10, the issue necessarily arose under 28 U.S.C. Section 1738 because the Full Faith and Credit Clause of the Constitution is in terms applicable only to the States. The Justices divided three ways on the question what full faith and credit requires in cases of successive workers' compensation awards, but none of the opinions contains the slightest suggestion that, by reason of the name or status of the Benefits Review Board, full faith and credit was not owing under the statute to the Virginia judgment.[11] Indeed, Petitioner believes that, in the long line of cases struggling with the meaning and authoritativeness of this Court's decisions in *Magnolia Petroleum v. Hunt*, 320 U.S. 430 (1943), and *Industrial Commission v. McCartin*, 330 U.S. 622 (1947), there is no indication that the applicablility of Section 1738 is impaired by the administrative nature of the tribunal in which the claim of preclusion is made. In at least one decision, moreover, the highest court of a State has taken a similar view; see *Evans v. Asphalt Roads & Materials Co.*, 194 Va. 165, 166-67, 72 S.E.2d 321, 322 (1952), holding the Virginia Industrial Commission bound by full faith and credit.

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[11] As Justice Rehnquist observed, in dissent but without contradiction on this point, the claim of full faith and credit was to a judgment and not merely a statute. 448 U.S. at 292.

The Court of Appeals was led to disregard so readily this settled practice by too facile a reliance on *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). That decision held Section 1738 inapplicable to "unreviewed state administrative factfinding," *id.*, at 794, and the Court of Appeals thought that the "same analysis" was applicable here. (A. 9, 930 F.2d at 320). But the Court ignored significant distinctions of both substance and language. First, it is one thing to say, as *Elliott* teaches, that Congress did not require courts to accord to "lesser" bodies the respect of preclusion law, even though the law of the rendering State may do so. But we are presented with the converse situation, where the decision of a court is invoked in a subsequent administrative proceeding, and it is quite another matter to conclude that, because of its "lesser" status, an administrative agency may disregard the decision of a court. The "literalness" of *Elliott* is consistent with, while that of the Court of Appeals is at war with, respect for the rationality of the Congressional mandate.

Beyond that, the words themselves are not so confining as the Court of Appeals' brief treatment suggests. Section 1738 speaks of decisions rendered in "judicial proceedings of any court of" any State, but, in mandating full faith and credit to those proceedings, it refers to "every court within" the United States. For purposes of Title 28, Congress has defined "court of the United States" as limited to those in which judges "hold office during good behavior," 28 U.S.C. Section 451, that is, to Article III, or "constitutional," courts. "Legislative" courts, although they are therefore not "courts of" the United States, presumably are "courts within" the United States, and subject to Section 1738; consistent with the rationale suggested in the preceding paragraph's discussion of *Elliott*, the lesser status of legislative courts does not exempt them from the binding effect of the full faith and credit requirement.

If "administrative agencies," however, are to be exempt, what is it that establishes a particular body as a (legislative) "court" or as an "agency"? Does Congress "make [a] board a court by changing its name," as this Court suggested with respect to the Customs Court in *Ex parte Bakelite Corp.*, 279 U.S. 438, 457 (1929)?[12] The apparent simplicity of such a response is drawn in question by the problematic quality of a decision that would hold that Section 1738 is at present inapplicable to the Board, but would become applicable were Congress (for wholly unrelated reasons) to change its name to, for example, the Court of Labor-Management Relations.

The evolution of the Tax Court lays bare the infirmity of such a simplistic response. The Board of Tax Appeals was established by Congress as "an independent agency in the executive branch of the Government" in 1924 (Revenue Act of 1924, Sec. 900(k), 43 Stat. 338). Its name was changed to the Tax Court by the Revenue Act of 1942, Sec. 504(a), 56 Stat. 957. A simple literal view presumably would hold that the Board of Tax Appeals, not being a "court," was not bound by Section 1738, but that it became subject to the requirement of statutory full faith and credit in 1942 by reason of the change in its name.

The difficulty is not merely the artificiality of such a resolution of the question of characterization.[13] It is not

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[12] The Court was not of course construing the Full Faith and Credit Act.

The Customs Court had been called the Board of General Appraisers, and "was an executive agency." *Ex parte Bakelite Corp., supra.* When Congress changed its name, "there was no change in powers, duties or personnel." *Ibid.* Congress subsequently elevated the Customs Court to the status of an Article III court, with judges holding office during good behavior, and in 1980 once again changed its name, to the Court of International Trade. 28 U.S.C. Sec. 251.

[13] *Compare* Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 725 (1929) ("The Board of Tax Appeals is not a court. It is

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merely that the change in name had a wholly non-substantive motivation.[14] It is that at the precise time that Congress changed the name of the tribunal from "Board" to "Court" it *retained* the description of the body as an "independent agency in the executive branch." Section 1100 of the Internal Revenue Code of 1939, after its amendment by the 1942 Act, read as follows:

> The Board of Tax Appeals (hereinafter referred to as the "Board") shall be continued as an independent agency in the Executive Branch of the Government. The Board shall be known as

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an executive or administrative board. . . . "); Commissioner v. Gooch Milling & Elevator Co., 320 U.S. 418 (1943) (quoting and relying on the legislative characterization of the Board as an "agency," *id.* at 420, the Court noted Congress' intention that the change in name (then recently adopted) "was to have no effect on the jurisdiction, powers and duties of the agency," *id.* at 418 n.1); 13 Wright, Miller & Cooper, *Federal Practice and Procedure* 35 (2d ed. 1984) ("[T]he Tax Court of the United States was not a court at all, despite its name, but was an adminstrative agency . . . "); and 14 Mertens, *Law of Federal Income Taxation* 50.09 (1991) ("[T]he Tax Court . . . remained an independent agency of the executive branch of the Government"), *with* Blair v. Oesterlein Machine Co., 275 U.S. 220, 227 (1927) ("[A]n examination of the [statutory provisions] can leave no doubt that they were intended to confer upon [the Board] appellate powers which are judicial in character"); House Report No. 1 on H.R. 1, 69th Cong., 1st Sess. 20 (1926) (the decisions of the Board of Tax Appeals are "judicial and not legislative or administrative decisions").

In 1969 Congress termed the Tax Court a court "established . . . under Article I" (26 U.S.C. Sec. 7441), that is, a legislative court.

[14] See 93 Cong. Rec. 8388 (1947) (remarks of Rep. Dingell: "[W]e were told by members of the Board of Tax Appeals that [the name change] would enable them more readily to obtain space in Federal courthouses. . . . ").

> the Tax Court of the United States and the members thereof shall be known as the presiding judge and the judges of the Tax Court of the United States.

A "Board" "shall be known" as a "Court," but "shall continue to be" an "agency!" It appears, then, on the face of the United States Code, that the categories, court and agency, are not employed by the Legislature as necessarily mutually exclusive.[15]

The necessary inference is that it is not the legislative adoption of the name, "court," that triggers the applicability of Section 1738; the literal words of Section 1738, which apply it to *all* "courts within the United States," do not invariably resolve the matter.

The parallel between the Tax Court and the NLRB is compelling. Congress has described the Board, much as it did the Tax Court, as "an agency of the United States," NLRA Section 3(a), 29 U.S.C. Section 153(a). If, as our discussion of the Tax Court establishes, the presence of the talismanic word, "court," does not by itself make the full faith and credit statute applicable, the Court of Appeals' version of a "literal" approach is undermined,

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[15] A leading student of federal jurisdiction concludes that "the Court cannot logically distinguish the work of non-Article III courts from that of administrative adjudicatory bodies." Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 Duke L.J. 197, 201. A widely respected administrative law scholar, in discussing "the great case of Crowell v. Benson," has described it as presenting the question whether Congress could confer certain authority on a " 'non-Article III' court, in this case an 'administrative agency'. . . . " L. Jaffe, *Judicial Control of Administrative Action* 87 (1965). Finally, the conclusion of Professor Kenneth Karst is no less apt for its irreverence: "Legislative courts are but agencies in drag; Glidden is not paint." *Federal Jurisdiction Haiku*, 32 Stanf. L. Rev. 229, 230 (1979).

and the absence of the talismanic word, "court," is no more controlling than its presence.[16]

The need is rather to make a more textured resolution of the question of characterization. There is respected analogous authority for a more functional approach. The Anti-Injunction Act, 28 U.S.C. Sec. 2283, bars federal injunctions against proceedings in a "State court," except in specified circumstances. In *Prentice v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), this Court, in holding the Act inapplicable to rate-making proceedings of the Virginia Corporation Commission, first accepted arguendo that the function, duties, and procedures of the Commission sufficed to establish it as a "court" within the meaning of the federal statute notwithstanding its name, 211 U.S. at 224, holding nonetheless that the Commission was not *acting as* a court in the proceeding in question, because rate-making was "legislative in nature." *Id.* at 226. Justice Holmes, for the Court, wrote:

> Proceedings legislative in nature are not proceedings in a court, within the meaning of [Section 2283], no matter what may be the general or dominant character of the body in which they may take place. . . . That question depends not upon the character of the body, but upon the character of the proceedings.

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[16] The United States Court of Military Appeals, itself a "legislative court" (see 10 U.S.C. Sec. 867) and termed by a leading treatise "a part of the government of the armed forces," 13 Wright, Miller & Cooper, *Federal Practice and Procedure* 37-38 (2d ed.1984), has ruled that not only it but the military courts-martials as well are bound by Sec. 1738 to give full faith and credit to State court judgments. United States v. Allen, 27 M.J. 234, 239 (Ct. Mil. App. 1988).

Ibid. It cannot be doubted that, however the "general or dominant character" of the NLRB may be characterized, unfair labor practice proceedings are *judicial* in nature.[17]

The functional approach that this Court took in *Prentice* to the question of the meaning of the word, "court," contrasts sharply with the woodenly literal approach of the Court of Appeals in the instant case. The selectivity of the Court's literalness renders its decision doubly problematic. The premises of this Court's decision in *Thomas, supra,* of the Eighth Circuit's decision in *Botz, supra,* and of the Virginia decision in *Evans, supra,* although articulated without discussion, are unmistakably in conflict with the analysis of the decision below. Moreover, the reasoning of the Court of Appeals is quite explicit, and the disruptive ripples of its decision will be widely felt. This case is therefore an appropriate vehicle in which to resolve the question of the applicability of Section 1738 to NLRB proceedings.[18]

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[17] "The National Labor Relations Board makes its decisions in representation and unfair labor practice cases in an adjudicatory or court-like setting." R. Gorman, *Basic Text on Labor Law* 15 (1976).

[18] The Court of Appeals, perhaps evidencing its uneasiness with its selective literalness, attempted to find "sound policy reasons" for its conclusion in the need to prevent varying State preclusion rules from undermining the federal interest in uniform enforcement of federal labor law. (A. 10, 930 F.2d at 320). This reasoning fails to give weight to this Court's decision in Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985), giving full effect to Section 1738 in antitrust cases, explicitly committed by Congress to exclusive federal-court jurisdiction. Cf. United States v. Stauffer Chemical Co., 464 U.S. 165, 174 (1984), declining to consider, as not necessary to resolve in the case at bar, the argument, there

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C. The decision below, that the principles of common-law preclusion do not govern NLRB proceedings independently of the Board's discretionary deferral rules, presents an important issue of federal law that has not been, but should be, resolved by this Court.

The Court of Appeals acknowledged, but paid only lip service to, the settled principle established by this Court that the inapplicability of Section 1738 does not end the inquiry as to preclusion. The Court began by quoting (A. 11, 930 F.2d at 320- 21) *University of Tennessee v. Elliott, supra,* where this Court noted: "[W]e have frequently fashioned federal common law rules of preclusion in the absence of a governing statute." 478 U.S. at 794. However, the Court of Appeals went on to treat the principle as wholly subsumed within the scope of NLRB deferral under federal labor policy (see A. 12-16, 930 F.2d at 321-22), reviewable only for abuse of discretion, and

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made with respect to the Environmental Protection Agency, that "because EPA is a federal agency charged with administering a body of law nationwide, the application of collateral estoppel against it will require EPA to apply different rules to similarly situated parties."

The Court of Appeals did not pass upon Respondent's contention that NLRA Section 10(a), 29 U.S.C. Sec. 160(a), constitutes an "implied repeal" of the Full Faith and Credit Statute. (See A. 11 n.3, 930 F.2d at 320 n.3). This Court's decisions in Allen v. McCurry, 449 U.S. 90 (1980), and Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982), establish that the Board's contention is founded on an invalid premise. As such, it gives "unwarrantedly short shrift to the important values of federalism and comity embodied in the Full Faith and Credit Act." Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 523 (1986) (emphasizing the necessity of construing a later statute consistently with Section 1738 "whenever possible," *id.* at 524).

held that, at least as a general matter, such review is limited to the question whether the Board applied its own deferral rules inconsistently. (A. 16, 930 F.2d at 322).

This decision effectively reads common-law preclusion out of the NLRA. Petitioner submits that it is plainly inconsistent with principles laid down in a series of decisions of this Court, and that the question of federal law presented is an important one, warranting resolution by this Court.

The two areas, common-law preclusion and labor law deferral, are of course related. As Petitioner will argue more fully in the event that this Petition is granted, the relevant Supreme Court precedents spelling out the contours of common-law preclusion point the inquiry toward the particularity of the applicable substantive statute and the relative efficacy of arbitration and litigation to resolve the question at issue, and these are also matters of significance in the shaping of labor law deferral principles.[19]

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[19] The specific question, the law governing judicially confirmed arbitration decisions drawn in question in proceedings before the NLRB, has not yet been adjudicated by this Court, but the inquiry is illuminated by a series of five highly relevant decisions, culminating in the recent ruling in Gilmer v. Interstate/Johnson Lane Corp., ___ U.S. ___, 111 S. Ct. 1647 (1991). See also Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); University of Tennessee v. Elliott, *supra*; Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981); McDonald v. City of West Branch, 466 U.S. 284 (1984). These decisions, involving administrative as well as arbitral proceedings, and litigation arising under four federal statutes, make relevant two areas of inquiry: the purposes and structure of the specific statute involved, and the suitability of the arbitral process to resolve fairly the particular kind of question involved. Close attention to the facts and rationales of these precedents, Petitioner will argue in its brief should certiorari

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The critical difference, however, between a judicially developed law of judgments, applicable to Labor Board proceedings as to all others, and a Board-developed law of deferral, is the weight to be given the Board's decision on appellate review.

It is exactly this difference that the Court of Appeals, by choosing to treat Petitioner's common-law preclusion contention as raising only deferral issues, has elided. The collateral estoppel effect of a State court judgment is not so easily swept within the ambit of Board discretion. The determination of the effect of the law of common-law preclusion is for courts to make as a question of law, indeed, as a question of the federal law of judgments, not of labor law. It is not a matter on which the Board has any relevant expertise. Bearing in mind that the arbitral decision was confirmed in court, and that the holding that statutory preclusion is inapplicable was based on a narrowly literal reading of Section 1738, the case for common-law preclusion should have been deemed at its strongest. Instead, the Court of Appeals collapsed it into the Board's discretionary deferral jurisprudence.[20]

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be granted, makes clear the merit in its common-law preclusion claim. Because of the grounds of its ruling, the Court of Appeals sidestepped this question.

Should its petition be granted, Petitioner will also present its grounds for contending that, independently of its statutory and common-law preclusion contentions, under applicable labor law principles the Board's refusal to defer to the specific factual determination of the arbitrator in this case should have been reversed by the Court of Appeals as an abuse of discretion.

[20] The Court of Appeals raised but did not resolve the question whether the limited scope of judicial review of arbitral decisions, adhered to in New Jersey as in most jurisdictions, might provide a basis for holding Section 1738

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The Court of Appeals found in NLRA Section 10(a)[21] warrant for its *de facto* abrogation of common-law preclusion. (A. 13, 930 F.2d at 321). In giving Section 10(a) this unprecedentedly broad scope, this decision unnecessarily sets up a conflict between the principles of the NLRA and the principles of common-law preclusion adopted by this Court. Its stance disregards the totality of the Legislature's labor-law enactments, and conflicts with the approach taken by the Court of Appeals for the Ninth Circuit in *NLRB v. Heyman*, 541 F.2d 796 (1976).

More than forty years ago, this Court made explicit its understanding that "Section 10(a) was designed, as its language declares, merely to preclude conflict in the administration of remedies for the practices proscribed by Section 8." *Algoma Plywood & Veneer Co. v. NLRB*, 336 U.S. 301, 306 (1949). Petitioner has taken every available opportunity to make clear to the ALJ, the Board, and the Court of Appeals its acknowledgment that it is raising a claim of issue preclusion only; the authority of the Board to decide whether Bedell was discharged discriminatorily, notwithstanding his having committed a verbal assault

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inapplicable. (A. 8-9, 930 F.2d at 319-20). As two Circuit Courts have squarely held, Caldeira v. County of Kauai, 866 F.2d 1175, 1178-79 (9th Cir. 1989); Gorin v. Osborne, 756 F.2d 834 (11th Cir. 1985), such a position is plainly foreclosed by this Court's decision in Kremer v. Chemical Constr. Corp., *supra*, at 480 n.21.

[21] Section 10(a) reads, in relevant part, as follows:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . .

29 U.S.C. Sec. 160(a).

on his supervisor, is not being challenged. No "conflict . . . in remedies" is in contemplation.

In reading Section 10(a) to displace common-law preclusion principles except as the Board may choose to follow them, the Court of Appeals lost sight of the fact that the arbitration proceeding in this case, carried out pursuant to the arbitration clause of the collective agreement between petitioner and Bedell's union, was an action to enforce a contract between the parties and was therefore governed by Section 301(a) of the Labor-Management Relations Act, 1947, 29 U.S.C. Section 185(a).[22] As such, it implicated a second federal statute, LMRA Section 203(d),[23] the significance of which the Court of Appeals failed to take into account. Giving full effect to the collateral estoppel aspects of arbitral decisions, especially those confirmed in court, integrates the interest of the Board under Section 10(a) in remaining able to adjudicate claims of unfair labor practice with the respect that Sections 203(d) and 301(a) give to the arbitral process for the resolution for breach-of-contract claims. See, *e.g.*, *United Paperworkers v. Misco*, 484 U.S. 29, 37 (1987). As the Court of Appeals for the Ninth Circuit has held:

> [T]he jurisdictional grant within Section 301 carries with it . . . the powers necessary to enforce judgments and to give judgments effect in such quasi-judicial forums as the NLRB, through the application of such doctrines as res judicata or

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[22] See, e.g., Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

[23] Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

29 U.S.C. Sec 173(d).

> collateral estoppel. . . . Although the authority of the Board to deal with an unfair labor practice which also violates a collective bargaining agreement is not displaced by Section 301, the Board's authority does not supplant the jurisdiction of the courts. . . .

NLRB v. Heyman, 541 F.2d 796, 799 (9th Cir. 1976). Although the Court of Appeals cited this decision as authority for the specific principle that the General Counsel is in privity with the charging party for preclusion purposes (A. 12, 930 F.2d at 321), the Court's treatment of the issue of common-law preclusion contradicts the more fundamental point expressed in the *Heyman* decision.[24]

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[24] "Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation." International Union of Mine Workers v. Eagle-Pitcher Mining and Smelting Co., 325 U.S. 335, 340 (1945).

The Court of Appeals appears not only to have forgotten the salience of these words, but of its own prior words, which compellingly articulate the basis for holding administrative tribunals bound to follow the rules of common-law issue preclusion:

> [T]he same policy reasons which underlie use of collateral estoppel in judicial proceedings are equally applicable when the administrative body acts as an adjudicatory body. It is well established that the doctrine of collateral estoppel contributes to efficient judicial administration, serving the public interest in judicial economy as well as the parties' interests in finality, certainty of affairs and avoidance of unnecessary relitigation.

Chisholm v. Defense Logistics Agency, 656 F.2d 42, 46 (3d Cir. 1981) (Sloviter, J.). See also the perception of the Court of Appeals for the Federal Circuit: "[T]he evils of vexacious litigation and waste of resources are no less serious because the second proceeding is before an administrative tribunal." The Young Engineers, Inc. v. United States International Trade Commission, 721 F.2d 1305, 1315 (Fed. Cir. 1983).

Finally, having first accomplished an end-run around statutory preclusion through the selective literalness of its approach, and then effected a *de facto* elimination of the principles of common-law preclusion from Labor Board jurisprudence, the Court of Appeals concluded with an analysis of the deferral question that constitutes a disregard or rejection of a central aspect of the concept of issue preclusion. Noting that the Board's jurisprudence calls for claim-preclusive deferral only when the arbitrator "has adequately considered the unfair labor practice issue" (A. 14, 930 F.2d at 321), the Court held that deferral regarding "specific facts found by the arbitrator" (that is, issue preclusion) was inappropriate "because the evidence related to the unfair labor practice claim . . . was not presented to the arbitrator." (A. 14-15, 930 F.2d at 322). With such evidence, the Court reasoned, the arbitrator might have resolved differently the critical issues of credibility bearing on the question whether there was "cause" for discharge under the collective agreement. *Ibid.*

The Court's analysis illustrates the hazard of collapsing the law of judgments into that of "deferral." The question whether there was an unfair labor practice, because the employer acted from a motive forbidden by the Act, was not "inadequately" litigated in arbitration; it was not litigated at all, and Petitioner has consistently acknowledged that the Board was the proper forum in which it could be adjudicated. The question whether a verbal assault occurred *was* litigated, and adjudicated, in arbitration, fully and fairly in accordance with the tactical decisions of counsel for both sides and the unchallenged evidentiary rulings of the arbitrator. If the concept of issue preclusion means anything, it means that references to the "inadequacy" of the prior determination are insufficient to warrant relitigation of *that* question. To use the existence of a proper basis for denying claim preclusion as grounds for denying issue preclusion is tantamount to depriving issue preclusion of any independent significance. The holding that the General Counsel could

relitigate the question whether a verbal assault had been committed in seeking to establish an improper motive, because evidence not offered by counsel for the grievants might have persuaded the arbitrator to disbelieve the company's witnesses to the assault, is nothing less, however bland and fact-specific it initially appears, than a lethal thrust at the core of the law of issue preclusion.

Counsel for the grievants, in challenging the credibility of Petitioner's witnesses, chose not to use what the ALJ described as "any of the matters involved in Bedell's EEOC charge" (A. 28), even though counsel had acknowledged that they were "related to the discharge" (R. 0018). Of course, any lawyer would welcome a chance to try a case aided by what he or she could learn from an earlier failed attempt. The law of issue preclusion is designed in significant part to deny counsel precisely that opportunity. It is not surprising, therefore, that hornbook law makes clear the infirmity in the Court of Appeal's analysis.[25]

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[25] If [an issue] has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result.

1B Moore, *Federal Practice* 728-29 (2d ed. 1988).

> The values of preclusion would be lost if proof of the quality of the decision were . . . permitted to the party opposing it. . . . [T]he opportunity to try this question would undermine any ability to rely on the finality of the first determination.

18 Wright et al, *Federal Practice and Procedure* 216 (1981).

The appellate courts of New Jersey, whose view of the law of issue preclusion is most relevant here, have specifically distinguished between a "clearly mistaken" factual determination, which suffices to undermine the conclusiveness of an arbitral determination, and situations "where the arbitrator bases his decision on one party's version of the facts, finding

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The arbitrator explained the basis for his discounting Bedell's credibility with respect to the assault. (A. 52). The Court of Appeals opined that a different record might have persuaded him that it was Smidt's and not Bedell's credibility that was suspect. Perhaps so, perhaps not. The second time around, Bedell, now a more experienced witness, was able to persuade a different trier of fact that he was the victim of Smidt's fabricating the entire episode, presumably as part of a company-wide conspiracy.[26] This, Respondent submits, the law of issue preclusion does not countenance.

The Court of Appeals' ruling is not merely a factual disagreement but a fundamental shriveling of both the range of application and the content of the common-law of issue preclusion.[27] As such, it warrants review by this Court.[28]

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that version to be credible," which do not. *Compare* Local 560, IBT v. Eazor Express Inc, 95 N.J. Super. 219, 230 A.2d 521, 525 (App. Div. 1967), *with* Local 153, OPEIU v. Trust Co. of New Jersey, 105 N.J. 442, 522 A.2d 992, 996 n.1 (1987). This declaration of New Jersey law only, of course, gives specific expression to what is central to the entire idea of issue preclusion. In the case at bar, the decision of the Superior Court confirming the award adjudicated that a subsequent attack on the evidentiary basis of the arbitrator's conclusions was not permissible.

[26] Compare the judgment of the arbitrator, that Smidt testified "in a straightforward, credible manner" (*supra*, p. 4, n.3), with that of the ALJ, described by the Board as relying on Smidt's "evasive demeanor" (*supra*, p. 8).

[27] The Court's reasoning thus contradicts its seeming reservation of the question whether, apart from its own deferral rules, "the Board would ever be bound as matter of common-law issue preclusion . . . ," (A. 16, 930 F.2d at 322), for the Court allowed its perception of the Board's deferral rules (A. 14, 930 F.2d at 321) to shape its perception of preclusion law.

[28] Should its Petition be granted, Petitioner will renew the contention, not passed on by the Court of Appeals (A. 16 n.4,

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CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JEFFREY IVAN PASEK
COHEN, SHAPIRO, POLISHER,
SHIEKMAN AND COHEN
PSFS Building, 24th Floor
12 South 12th Street
Philadelphia, PA 19107
(215) 922-1300

Attorneys for Petitioner
Yellow Freight System, Inc.

OF COUNSEL:

HOWARD LESNICK
3400 Chestnut Street
Philadelphia, PA 19104

(Continued from previous page)

930 F.2d at 322 n.4), that, in the absence of a finding that Bedell did not assault Smidt, the Board's decision is not supported by substantial evidence.

APPENDIX

TABLE OF CONTENTS

Pages

Description of Documents

1. United States Court of Appeals for the Third Circuit Opinion filed April 11, 1991 ..... A-1

2. National Labor Relations Board Decision and Order dated November 21, 1989 ..... A-18

3. Administrative Law Judge Decision dated May 18, 1989 ..... A-20

4. Superior Court of New Jersey Order and Judgment filed February 10, 1989 ..... A-44

5. Award of Arbitrator Daniel F. Brent dated August 11, 1988 ..... A-47

Filed April 11, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-3272

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

YELLOW FREIGHT SYSTEMS, INC.,

Respondent

On Appeal from an Application for Enforcement
of an Order of the National Labor Relations Board
(Board Docket No. 22-CA-15817)

Argued November 8, 1990

Before: SLOVITER, *Chief Judge**, SCIRICA,
and SEITZ, *Circuit Judges*

(Opinion filed April 11, 1991)

Jeffrey Ivan Pasek
Cohen, Shapiro, Polisher, Shiekman & Cohen
Philadelphia, PA 19107

Of Counsel:
Howard Lesnick (Argued)
Philadelphia, PA 19104

Attorneys for Respondent

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* The Honorable Dolores K. Sloviter became Chief Judge on February 1, 1991.

Jerry Hunter
General Counsel
Robert E. Allen
Associate General Counsel
Aileen A. Armstrong
Deputy Associate General Counsel
Frederick C. Havard (Argued)
National Labor Relations Board
Washington, D.C. 20570

Attorneys for Petitioner

OPINION OF THE COURT

SLOVITER, *Chief Judge.*

The National Labor Relations Board (NLRB or Board) petitions this court to enforce its final decision and order in which it found that the employer, Yellow Freight Systems, Inc., discharged employee Lonnie Bedell for engaging in activities protected by the National Labor Relations Act and therefore committed an unfair labor practice in violation of sections 8(a)(1) and 8(a)(3) of the Act, 29 U.S.C. §§ 158(a)(1) and 158(a)(3) (1988). The employer asserts that we should decline to enforce the Board's decision on the ground that the administrative law judge was bound to a finding in an earlier arbitration proceeding that Bedell assaulted a supervisor. We must therefore decide the extent to which the Board must accord issue preclusive effect to that arbitral finding.

I.

Facts and Procedural History

Lonnie Bedell was hired in 1983 as a dock wo-ker at Yellow Freight's Carlstadt, New Jersey facilities. His

testimony as to the relevant facts set forth below was credited by the ALJ following a hearing. In April 1986, Bedell observed JoAnne DeGrosa, the sales secretary, crying in the company parking lot after she had dropped her keys. DeGrosa told Bedell that she had been sexually harassed by branch manager Dan Hamlin and sales manager Kenny Dore. Bedell reported the incident to his shop steward the following evening and requested that the steward discuss the allegations with Dore. Dore approached Bedell a day later, and told him that DeGrosa was not a union member and that the matter was none of Bedell's business.

The sexual harassment continued, and DeGrosa was discharged three months later. Bedell accompanied DeGrosa to the New Jersey Division of Civil Rights, assisted her in filing a claim with the Equal Employment Opportunity Commission, and signed an affidavit on her behalf. Thereafter, Bedell posted on the union's bulletin board a newspaper advertisement for an upcoming television series on workplace sexual harassment. As he did so, Bedell commented to a supervisor that Dore and Hamlin "shouldn't have done that to JoAnne DeGrosa." Supp. App. at 61-61B.

Shortly after these events occurred Bedell's supervisors began to give him more arduous and dangerous assignments, such as transporting heavier loads without mechanical assistance and working in the hazardous area of the dock where corrosive liquids are stored, even though he was the most senior dock worker at the Carlstadt facility. Bedell also was subjected to frequent workplace harassment. Although he apparently complained on several occasions to his supervisors and to the union

officials, Bedell continued to be harassed. Bedell left the Carlstadt facility in 1987 and transferred to Yellow Freight's new terminal in Elizabeth, New Jersey. Dore was then appointed as the operations manager in Elizabeth. Bedell was again assigned harder and more demeaning work than he had been assigned before he assisted JoAnne DeGrosa, such as cleaning the coffee room and working without the use of the forklift truck and drag line.

Bedell filed his own charge with the Equal Employment Opportunity Commission on January 19, 1988, in which he asserted that he was being subjected to constant harassment in retaliation for the assistance he rendered to DeGrosa in opposing Dore's and Hamlin's sexual harassment practices. On February 3, 1988, Bedell was assigned to unload and move 40 cartons, each weighing 24 pounds. While he was in the process of placing them into three carts his supervisor Joseph Smidt ordered him to consolidate the cartons into two carts.

Bedell and Yellow Freight contest the events that followed this order. Bedell contends that he told Smidt that he would follow the order but added "and I am not a piece of shit," in protest of the continuous harassment. Supp. App. at 88. Yellow Freight claims that he refused to follow the order, exclaiming, "because you're a big piece of shit. . . . [a]nd you're a scum bag, too." App. at 63-64. Smidt testified that Bedell came toward him waving his hands up and down and staring with a crazed look in his eyes. Smidt is 6 feet 2 inches tall, weighs 260 pounds, is 20 years younger than Bedell, and is a judo and karate champion. Bedell weighs 170 pounds. Smidt testified that he nevertheless feared bodily injury because he had

heard rumors that Bedell carried a gun and had used it to threaten others. Smidt testified he turned and walked quickly to Dore's office. Bedell testified Smidt walked away and talked to the shift operation manager who was 30 or 40 feet away, and who told Bedell to go to Dore's office.

Bedell was thereafter discharged for disobeying a direct order and assaulting a supervisor.[1] Bedell filed a second complaint with the Equal Employment Opportunity Commission, alleging that he was fired in retaliation for filing his first EEOC complaint.

Bedell also filed a grievance based on his discharge which was arbitrated at a two-day hearing. Bedell retained personal counsel to represent him who also represented the union, Local 641 of the International Brotherhood of Teamsters, Chauffers [sic], Warehousemen and Helpers of America, AFL-CIO. Bedell was permitted to call his own witnesses and to cross-examine Yellow Freight's witnesses.

The hearing was limited, without objection by Yellow Freight, to the issue of whether there was just cause for Bedell's termination under the collective bargaining

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[1] According to the arbitrator, "if the grievant's physical action toward his supervisor placed the supervisor in reasonable fear of imminent hostile touching or bodily injury, then such actions – especially when viewed in combination with the loud and angry words spoken by the grievant – constituted an assault on the supervisor which would satisfy both the criteria for summary discharge expressly established by the National Master Freight Agreement and the criteria universally applied in the work place." App. at 489-90.

agreement entered into between Yellow Freight and the union. Bedell's lawyer stated on the record that he did not intend to raise any of the issues pertaining to Bedell's EEOC charges. The arbitrator found that although Bedell did not disobey a direct order, he did assault his supervisor, and there was therefore just cause for his discharge. He noted in his opinion that, "[t]he grievant's credibility was substantially diminished by the fact that he did not previously grieve what he characterized as unfair treatment when he was ordered to push his carts and not to use the drag line." App. at 491. Bedell appealed the arbitrator's decision to the Superior Court of New Jersey, which affirmed without opinion.

Finally, Bedell filed charges with the National Labor Relations Board alleging that his discharge by Yellow Freight constituted an unfair labor practice. The administrative law judge conducted a hearing after the arbitrator's decision was made. The ALJ found that Yellow Freight committed unfair labor practices in violation of sections 8(a)(1) and 8(a)(3) of the NLRA because Bedell was harassed and discharged for supporting DeGrosa's sexual harassment claim. In so finding, the administrative law judge concluded that much of the testimony supporting Yellow Freight's allegations that Bedell committed an assault was not credible. The ALJ refused to defer to the arbitrator's finding that Bedell had assaulted his supervisor, noting, "[i]t would not be appropriate to do so as the conflicting accounts presented to me for resolution are necessarily enmeshed with the evidence bearing on the EEOC matters." Supp. App. at 12.

The Board affirmed the ALJ's rulings, findings, and conclusions. It adopted the recommended order which

directed Yellow Freight to (1) cease and desist from discriminating against and coercing employees in the exercise of their rights guaranteed by the NLRA; (2) reinstate Bedell with back pay and full seniority and remove from his files any reference to his unlawful discharge; (3) make available any records necessary to calculate back pay; and (4) post a notice to Yellow Freight's employees of the violation and compliance with the Board's order in a conspicuous place. The Board has petitioned this court to enforce the decision and order pursuant to section 10(e) of the NLRA, 29 U.S.C. § 160(e) (1988).

II.

Statutory Preclusion

According to the general rule regarding issue preclusion, or collateral estoppel, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 27 (1982); *see also Rider v. Commonwealth of Pennsylvania*, 850 F.2d 982, 989 (3d Cir.), *cert. denied*, 488 U.S. 993 (1988).

Yellow Freight contends that either federal statutory or federal common law requires the NLRB to accord issue preclusive effect to the arbitrator's finding that Bedell assaulted his supervisor. Its statutory argument is based on the full faith and credit statute which provides that, "[t]he Acts of the legislature of any State . . . [and] [t]he records *and judicial proceedings* of *any court* of any such State . . . shall have the same full faith and credit *in every*

court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738 (1988) (emphasis added). Yellow Freight argues that because New Jersey would give the arbitrator's finding preclusive effect, so also must the Board.

Were we dealing merely with the arbitrator's finding, this case would be easier. Section 1738 does not by its terms apply to the findings of an arbitrator, and the Supreme Court has held that section 1738 preclusive effect need not be given to an unreviewed arbitration award. *See McDonald v. City of West Branch*, 466 U.S. 284, 287 (1984). The Court reasoned that arbitration cannot provide an adequate substitute for a judicial proceeding to protect federal statutory and constitutional rights. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 477 (1982) (arbitration decisions not subject to mandate of § 1738).

When a state court has affirmed an arbitration award, different considerations apply because then the issue is the preclusive effect to be given to a state court judgment. In *Jalil v. Avdel Corp.*, 873 F.2d 701, 704 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 725 (1990), we held that section 1738 did not require that we afford preclusive weight to a state court's affirmance of an arbitrator's decision that an employee was discharged for insubordination rather than union activity because we concluded that the state court's review was narrow and it did not address the Title VII issues which were raised in the federal suit. The opinion suggests, however, that if the issues adjudicated by the state court were identical to those in the federal suit,

section 1738 would require preclusion,[2] provided that the grievant was afforded a full and fair opportunity to litigate his claim in arbitration and the state court review is not too narrow to warrant the application of collateral estoppel. *Cf. Bottini v. Sadore Management Corp.*, 764 F.2d 116, 121 (2d Cir. 1985) (state court scope of review of arbitrator's decision too narrow to give state judgment preclusive effect). We need not decide whether the New Jersey Superior Court judgment was based on a similarly restrictive review because we conclude that in any event section 1738 does not apply to the NLRB.

The terms of the statute require only *courts* of the United States to give issue preclusive effect to state court decisions. The directive of section 1738 has been literally applied. The same analysis used in holding that section 1738 does not require giving preclusive effect to state administrative factfinding, *see University of Tennessee v. Elliott*, 478 U.S. 788, 794 (1986), or arbitration awards, *see*

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[2] In *Jalil*, we distinguished Rider v. Commonwealth of Pennsylvania, 850 F.2d at 988, where we gave preclusive effect to a Pennsylvania Commonwealth Court judgment holding that the hiring of female guards to monitor female prisoners was a bona fide occupational qualification. We note that the statement in *Jalil* that in *Rider* "we held that an earlier state court *affirmance* of an arbitrator's decision precluded a federal discrimination action," 873 F.2d at 705 (emphasis added), was incorrect because in *Rider* the Commonwealth Court vacated the arbitrator's decision on the ground that it was not rationally derived from the terms of the collective bargaining agreement. *See* 850 F.2d at 986. Thus, *Rider* did not concern the preclusive effect to be given an arbitrator's decision, reviewed or unreviewed.

McDonald, 466 U.S. at 287-88, because they are not "judicial proceedings" requires a conclusion that federal administrative agencies are not bound by section 1738 because they are not "courts."

In *Elliott*, the Court noted that section 1738 was enacted before the development of administrative agencies, 478 U.S. at 795, and thus limited its consideration of the preclusive effect to be given to state administrative decisions to the federal common law, eschewing the statute. If the phrase "judicial proceedings" is not broad enough to encompass the decisions of administrative law judges or the NLRB itself, then the phrase "courts" is similarly too narrow to encompass the Board's decision and order.

There are sound policy reasons why the Board should not be constrained by section 1738. Under that statute, preclusive effect is given to a state court judgment only to the extent the state itself would accord the judgment preclusive effect. *See, e.g., Kremer*, 456 U.S. at 466; *Jalil*, 873 F.2d at 704. If section 1738 were applicable to the Board, then its effectiveness in remedying unfair labor practices would be dependent upon the states' varying views of claim or issue preclusion. Such a result would compromise the uniformity of rights intended by the passage of the federal labor laws. *Cf. Garner v. Teamsters Union*, 346 U.S. 485, 490 (1953) (discussing Congress' intention in enacting Labor Management Relations Act provisions to avoid "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies"). Moreover, we deem it significant that Yellow Freight cites no case, nor have we found one, that holds that notwithstanding the language of section 1738

restricting its application to courts, administrative agencies are similarly bound to its command.

Yellow Freight argues that even if the Board is not required to accord issue preclusive effect to the New Jersey Superior Court's summary affirmance of the arbitrator's decision, this court must do so because, as a "court," we fall within the literal language of section 1738. We cannot accept this effort to effect indirectly what cannot be accomplished directly. If a reviewing court must deny enforcement of a Board order whenever its decision relies on facts inconsistent with those earlier found by an arbitrator and upheld by a state court, then we would in effect be forcing the Board to accord issue preclusive effect to the arbitrator's factfinding. Whatever the merits of such a legal rule, we have already concluded that it cannot be supported by section 1738. Because it would be anomalous to conclude that although the Board is not statutorily required to defer to the arbitrator's factfinding, the same statute works to deny enforcement of its orders whenever it fails to so defer, we decline to so hold.[3]

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[3] In light of our conclusion that section 1738 does not constrain NLRB factfinding, we need not consider the Board's alternative argument that section 10(a) of the NLRA, 29 U.S.C. § 160(a) (1988), constitutes an implied repeal of section 1738 as applied to NLRB factfinding.

III.

Common Law Preclusion

Of course, our conclusion that section 1738 is inapplicable here does not end our inquiry, for courts have "frequently fashioned federal common-law rules of preclusion in the absence of a governing statute." *Elliott*, 478 U.S. at 794; *see also McDonald*, 466 U.S. at 288 ("Because federal courts are not required by statute to give res judicata or collateral-estoppel effect to an unappealed arbitration award, any rule of preclusion would necessarily be judicially fashioned."). Thus, in *Elliott* the Supreme Court applied common law preclusion principles to Title VII litigation, holding that "when a state agency acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, . . . federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." 478 U.S. at 799 (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)).

Common law preclusion also has been applied to collaterally estop the NLRB from finding the existence of a collective bargaining agreement when a federal court had earlier ruled that no binding labor agreement had been formed. *See, e.g., NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31 (1st Cir. 1987); *see also NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976) (Board precluded from determining that employer's repudiation of agreement and refusal to negotiate constituted an unfair labor practice where a federal court had earlier rescinded the collective bargaining agreement).

Yellow Freight contends that a common law rule of preclusion should be applied here because federal labor policy strongly encourages the private resolution of labor disputes. Federal courts have indeed consistently given highly favorable status to consensual arbitration. *See, e.g., Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 243 (1970) (noting importance of arbitration as an instrument of federal policy for resolving disputes between labor and management); *NLRB v. A. Duie Pyle, Inc.*, 730 F.2d 119, 124 (3d Cir. 1984) (law gives highly favorable status to private, amicable resolution of labor disputes); *NLRB v. Pincus Bros., Inc. Maxwell*, 620 F.2d 367, 372 (3d Cir. 1980) (acknowledging national policy in favor of the private resolution of labor disputes through consensual arbitration). We note, however, that Yellow Freight's rule of preclusion might tend to undermine this federal preference for arbitration because if the Board were required to defer to the arbitrator's factual findings, employees might decide to forgo arbitration of their grievances in order to preserve their unfair labor practice claims.

In any event, the policy in favor of arbitration must be balanced against a federal policy to ensure the ability of the NLRB to remedy unfair labor practices. The preeminence of the congressional policy in favor of remedying unfair labor practices is reflected in section 10(a) of the NLRA, which states that the Board's power to prevent such practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U.S.C. § 160(a) (1988). This section has been cited to emphasize that the Board acts in the public interest to enforce public,

not private rights, and that the "parties cannot by contractual agreement divest the Board's function to operate in the public interest." *Gulf State Mfrs. v. NLRB*, 598 F.2d 896, 901 (5th Cir. 1979) (en banc).

The Board itself, recognizing the value of arbitration under certain circumstances, has voluntarily and as a matter of its own discretion adopted a deferral policy under which it will defer to an arbitrator's award provided certain conditions are met: the proceedings appear to have been fair and regular, all parties have agreed to be bound, the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act, and the arbitrator has adequately considered the unfair labor practice issue. *See e.g., Olin Corp.*, 268 N.L.R.B. 573, 573-74 (1984); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955); *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 549 (3d Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984).

Although we have held that it is the court's responsibility to ensure that the Board follow its own policies, *see NLRB v. Pincus Bros. Inc. Maxwell*, 620 F.2d at 372, we review the Board's deferral decisions for abuse of discretion only. *Al Bryant*, 711 F.2d at 550; *NLRB v. General Warehouse Corp.*, 643 F.2d 965, 970 (3d Cir. 1981). We have explicitly recognized the importance of the Board's condition that deferral depends on the arbitrator's consideration of the statutory issue. In *Al Bryant* we stated, "[t]he requirement that the statutory issues have been presented to and decided by the arbitrator is of particular significance to insure that the Board does not abdicate its responsibility to protect statutory rights." 711 F.2d at 550; *see also NLRB v. General Warehouse Corp.*, 643 F.2d 965 (3d Cir. 1981) (Board not required to accord claim preclusive

effect to arbitrator's decision that there was just cause for employee's discharge because arbitrator never considered unfair labor practice issues before the Board).

Yellow Freight concedes that the arbitrator never considered whether unfair labor practices had been committed and that, under the Board's deferral policy, the Board should decide whether the unfair labor practice charges at issue have merit. Nevertheless, Yellow Freight argues that in considering the merits the NLRB should be required to defer to specific facts found by the arbitrator, namely, that Bedell assaulted his supervisor. The Sixth Circuit rejected a similar claim, holding that deference to an arbitrator's factfinding is not warranted in cases where "the arbitrator was not fully apprised of the facts relevant to the unfair labor practice charge." *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 116 (6th Cir. 1987). We agree with that court's reasoning that "[i]t makes little sense to defer to the arbitrator's specific factual findings where deference overall was refused because of the inadequacy of the factual presentation to the arbitrator." *Id.*

The motivations and the credibility of the parties and their witnesses may take on an entirely new light once the additional facts related to the unfair labor practice charge are introduced. In the present case, for example, the administrative law judge had reason to question the credibility of Yellow Freight's witnesses' version of the facts in light of the evidence presented to him regarding Bedell's past employment relationship with his supervisors. On the other hand, the arbitrator never heard much of the evidence of Dore's harassment of Bedell in retaliation for Bedell's assistance of DeGrosa. Moreover,

the arbitrator, who discounted Bedell's credibility on the ground that Bedell had not previously grieved his treatment, was apparently unaware that Bedell had complained about harassment in the EEOC claim that he filed shortly before his discharge.

Because the evidence related to the unfair labor practice claim, here the history of discrimination and Bedell's earlier efforts to alleviate the conditions under which he was forced to work, was not presented to the arbitrator, the ALJ did not abuse his discretion in concluding that the conflicting accounts of Bedell's actions on the day he was discharged from Yellow Freight were "necessarily enmeshed with the evidence bearing on the EEOC matters," Supp. App. at 12, and that deference to the arbitrator's factfinding was therefore not warranted.

We need not in this case decide whether the Board would ever be bound as a matter of common law issue preclusion to defer to an arbitrator's factual findings in a case where deference to an arbitrator's award was not required under the Board's own deferral policy. It is sufficient to resolve the issue before us to hold that the Board is not bound to the earlier factual finding of an arbitrator when the arbitrator was not presented with evidence essential to the Board's resolution of that same factual issue in disposing of an unfair labor practice charge.[4]

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[4] Because we conclude that the administrative law judge permissibly found that Lonnie Bedell did not in fact assault his supervisor, we need not address Yellow Freight's contention that in the absence of this finding the Board's conclusion was not supported by substantial evidence.

IV.

Conclusion

For the foregoing reasons, we will enforce in its entirety the decision of the National Labor Relations Board ordering Yellow Freight to reinstate Lonnie Bedell with back pay and to cease and desist from engaging in unfair labor practices.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

SHD

297 NLRB No. 50

D-1049
Elizabeth, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
YELLOW FREIGHT SYSTEMS, INC.

and Case 22-CA-15817

LONNIE BEDELL, an Individual

DECISION AND ORDER

On May 18, 1989, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In agreeing with the judge's credibility resolutions regarding events on the day of Bedell's discharge, we find it unnecessary to rely either on the judge's finding that there had been no

(Continued on following page)

D--1049

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Yellow Freight Systems, Inc., Elizabeth, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. November 21, 1989

James M. Stephens, Chairman

John E. Higgins, Jr., Member

Dennis M. Devaney, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

(Continued from previous page)

rumors that Bedell possessed a gun or on the judge's speculation that if Smidt really believed Bedell had a gun, Smidt would have "swiftly disarmed" or "dismembered" Bedell." We note that, considering Smidt's evasive demeanor while testifying, the judge concluded that Smidt's claim that Bedell had behaved in a threatening manner was untrue.

We correct the following inadvertent errors of the judge. Bedell worked for the Respondent 4 years and 3 months, not 5 years; Kenneth Dore was the operations manager at the Elizabeth terminal, not the terminal manager; and the correct spelling of the names of the following individuals is "Chuck Gruppusso" and "Joann DeGrosa."

JD(NY) - 14 - 89
Elizabeth, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

YELLOW FREIGHT SYSTEMS, INC.

and Case No. 22-CA-15817

LONNIE BEDELL, An Individual

Maria E. Balzano, Esq. and
Renee I. Crain, Esq.,
Counsel for the General Counsel.

Jeffrey I. Pasek, Esq. and Paul J.
Russoniello, Esq. (Cohen, Shapiro,
Polisher, Shiekman & Cohen), of
Philadelphia, PA, for Yellow
Freight Systems, Inc.

DECISION

Statement of the Case

JAMES F. MORTON, Administrative Law Judge: The complaint alleges that Yellow Freight Systems, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act) by discharging Lonnie Bedell from its employ because he assisted another employee in filing a charge against Respondent with the United States Equal Employment Opportunity Commission (EEOC) and because he filed a charge with EEOC alleging that Respondent then retaliated against him, both of which are matters assertedly covered by a collective bargaining agreement Respondent has with a labor organization.

Respondent's answer denies that allegation and states also that Bedell's alleged activity on behalf of another employee was not protected by the Act, based on Respondent's contention that the other employee had been a confidential employee. Further, Respondent asserts that the Board should defer to the findings in an arbitration award that upheld Bedell's discharge.

The hearing on the complaint was heard in Newark, New Jersey on November 28 and 29 and on December 5 and 20, 1988. Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

Findings of Fact

I. Jurisdiction and Labor Organization

The pleadings establish, and I find, that Respondent is engaged in the interstate and intrastate transportation of freight and that its operations meet the Board's applicable jurisdictional standard. Further, I find, also based on the pleadings, that Local 641, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, (Local 641) is a labor organization as defined in Section 2(5) of the Act.

II. The Alleged Unfair Labor Practice

A. Background

Bedell was discharged on February 3, 1988 from his employment by Respondent as a dockman at its Elizabeth, New Jersey terminal. General Counsel contends

that his discharge was the culmination of a series of harassing tactics begun in 1986 when he was working at Respondent's Carlstadt, New Jersey terminal. General Counsel is precluded by the limitations period of Section 10(b) of the Act from asserting that the alleged acts of harassment constitute unfair labor practices under the Act. To put General Counsel's contention in perspective and also to be able to evaluate Respondent's assertions, it is necessary to consider first certain events that occurred at the Carlstadt's terminal in 1986 and other events that occurred at Local 641 meetings.

Bedell has worked for about 30 years as a dockman in the freight transportation industry, the last 5 for Respondent. In 1986, he was working on the night shift at Respondent's terminal in Carlstadt. Kenneth Dore was the branch manager there and Dan Hamlin was the sales manager. Jo Anne DeGrosa was an office employee there.

B. Events in April 1986

Bedell testified as follows. In April 1986, he was in the parking lot at the Carlstadt terminal just prior to the start of his shift when he noticed that a woman was crying and that she had dropped her car keys while trying to open her car. He asked her if he could help. She told him that she had been subjected to sexual harassment by Dore and and [sic] Hamlin. Bedell calmed her down and told her he would talk to his shop steward. The woman was DeGrosa.

Local 641 represents the dockmen at Carlstadt. It also represents the office employees there.

Bedell testified that he saw the shop steward, Charles Kaminski, the next evening and asked him to speak to Dore about what De Grosa had told him. Bedell further related that, on the following day, Dore told him, Bedell, that Kaminski had spoken to him about DeGrosa and that Dore also told him that DeGrosa "is not a union person and that's none of your business." Bedell testified further that he answered that he felt it was his business and that Dore walked away, saying again that it was none of Bedell's business.

Kaminski was called as a witness by Respondent. He testified on his direct examination on various matters but not as to his conversation with Bedell in April 1986 pertaining to DeGrosa. Dore also testified for Respondent. He answered in the negative when asked, on his direct examination, whether he was aware of any efforts made by Bedell to help DeGrosa prior to her discharge in July 1986. I credit Bedell's detailed account, which was, in material respects, corroborated by DeGrosa.

C. Incidents Involving EEOC in 1986 and 1987 and Alleged Harassment

In addition to the above described incidents in April, 1986, the following evidence was proffered by the General Counsel as to Bedell's alleged protected activities and Respondent's hostility to them.

DeGrosa was discharged on July 11, 1986. Bedell took her to the office of the New Jersey Division of Civil Rights on several occasions thereafter, including August 29, 1986 when she filed a Charge of Discrimination against Respondent, alleging therein sordid details of

sexual harassment purportedly committed by Dore and Hamlin.

On November 29, 1986, according to Bedell, he posted on Local 641's bulletin board at the Carlstadt terminal, a newspaper advertisement which promoted a special report on the subject, "Sexual Harassment on the Job" to be shown on a television news program throughout that week. Bedell testified that Respondent's Operations Manager, John McNamara, was present when he posted that advertisement. Bedell testified, without contradiction, that one of Respondent's supervisors, Chuck Gruppiano, asked him what the posting was all about and that he replied that Dore and Hamlin "shouldn't have done that to Joanne DeGrosa."

Bedell testified that, soon after he posted the newspaper advertisement on the subject of sexual harassment, he was given more arduous work assignments in retaliation. Thus, he testified that before December 1986, he, as the most senior dockman at Carlstadt, had rarely been assigned heavy loads to move and when he was assigned to heavy loads, he had been given a fork-lift truck to move them. In December 1986 according to Bedell, all that changed; he had to "walk" heavy loads almost everyday. Bedell testified that Respondent also began to assign him regularly to work in an area in front of Dore's office and in "the hazardous ara [sic]." The latter is an area where corrosive liquids are stored which on occasion leak. Bedell's testimony is that these onerous assignments continued until the end of July 1987 when Dore was removed as branch manager at Carlstadt.

Respondent called witnesses who testified in substance that Bedell was never treated differently from any other employee, except that it kept him under close supervision because he was not a productive worker. Respondent's witnesses testified that it kept no records of his productivity or lack thereof and that it could not issue a warning to a dockman even if his productivity was poor. Records subpoenaed by General Counsel disclose that Respondent has issued written warnings to an employee for, *inter alia*, poor productivity.

Bedell's account was corroborated by John Buchmuller, a dockman who worked at Carlstadt with Bedell. The parties stipulated that three other dockmen there, if they were called as witnesses would testify as Buchmuller did. I credit Bedell's testimony as to his receiving more arduous work assignments while under Dore at Carlstadt for the period December 1986 to July 1987. Bedell's account did not appear to be contrived and it was independently corroborated; Respondent's explanations were unconvincing and the limited documentary evidence did not support them.

Bedell uncontrovertedly related the following incident. In May, 1987, dock supervisor Gruppiano posted on Respondent's bulletin board at Carlstadt an excerpt from a handbook which pertained to EEOC rules. Bedell asked Gruppiano if he could look at the handbook, stating to Gruppiano that there has to be something in it on the subject of sexual harrassment. Gruppiano gave him the book. Bedell testified that the subject of sexual harassment was discussed on page 43 of the handbook. He asked Gruppiano for a copy of the handbook. Grupiano replied that he would have to clear the request with Dore.

Two hours later, according to Bedell he repeated his request of Gruppiano when he saw him. Gruppiano then stated, according to Bedell, that Dore "went off the wall" when he heard of the request, that Dore told him not to give Bedell a copy and that Dore also told him that he should never even have shown the handbook to Bedell. Again, I credit Bedell's uncontroverted testimony.

Bedell testified as follows as to an order he received later that month from an operational supervisor at Carlstadt, Robert Sparks. He was ordered to finish unloading a trailer, then one-quarter full, by lunchtime. It was then 20 minutes before lunch. When Bedell said that he could not possibly finish before lunch, Sparks told him that he would have to see Dore with his steward if he did not finish by lunch. Later that day and after it had taken him two hours to empty the trailer, Sparks told him that, if he cannot handle the pressure, he should retire. Sparks testified and denied that he had harassed Bedell in any way, I credit Bedell's detailed account.

Bedell also gave the following uncontroverted testimony respecting a remark made to him by dock supervisor Mike Lensack in May or June 1987. While making a dock check at the time the shifts were changing, Lensack said to Bedell, "you're going to get yours." Bedell asked what that meant. Lensack gave him an angry look and kept walking. I credit Bedell's account as to this incident.

On July 28, 1987 Dore issue a letter to Bedell warning him for having left work early on July 18. Bedell saw Dore and told him, in substance, that he does not take time off from work without a good reason. Dore looked at Bedell's file and observed that it was true that Bedell

does not "lose work." Dore left the Carlstadt facility on July 30. His replacement, John McNamara, sent Bedell a letter on July 31, rescinding the July 28 warning.

D. Bedell's Transfer to Elizabeth

In early October 1987, Respondent decided to open a terminal in Elizabeth, New Jersey. Its employees at the Carlstadt terminal were notified that, if they wanted to be eligible to transfer there, they had to sign a register on or before November 13, 1987. Bedell waited until almost the last moment before signing that register. According to him, he signed it because the assistant shop steward Peter Enrico had informed him that he was not going to sign that register. His testimony indicates, that, notwithstanding, Enrico then signed the register. Bedell was aware then of a rumor that Dore would be the terminal manager at Elizabeth when it opened.

Bedell, who at one time had been a shop steward, was aware when he signed the register, that the Local 641 contract contained a provision whereby employees who transferred had a 30 day grace period during which they could return to their former terminal. However, Local 641's business representative, John Bowers, informed the Carlstadt employees two weeks later that the 30 day return provision would not apply to the transfers to Elizabeth.

The Elizabeth terminal opened on December 7, 1987. Bedell reported to work there the next day. Dore was terminal manager there.

E. Alleged Harassment of Bedell at Elizabeth

Among the first assignments Bedell received when he reported on December 8 was an order given him by Respondent's shift operations manager, Peter Esposito, to clean the coffee room. That job is the responsibility of porters who were working there then. Respondent offered evidence that it had decided to assign the most senior man on each shift to clean the coffee room in order that he might set an example for the other dockmen. That explanation strikes me as highly suspicious.

Bedell's testimony is that Respondent's supervisors, during the two month period he worked in Elizabeth until his discharge, assigned him to put heavy loads in carts and to walk them instead of permitting him the use of a fork-lift truck or of the drag line. The drag line is an [sic] cable that pulls carts along to the stations where they are unloaded. In contrast to the treatment given him, according to Bedell, the other dockmen who were all less senior to him used the drag line every day. Bedell's testimony too is that he unlike other dockmen, was frequently assigned to work directly in front of a supervisor's desk and that he was never assigned a helper, except for one occasion. On that occasion, he had sought to use a fork-lift truck to move a rug but a supervisor told him not to use it and instead assigned a dockman to help him carry the rug.

Respondent offered testimony that Bedell did have use of the drag line, was given fork-lifts and helpers and that it frequently assigned him to work directly in front of a supervisor because his productivity was poor. Bedell's account is the more persuasive and I accept it.

F. Bedell's Discharge

General Counsel contends that Respondent's harassment of Bedell culminated in his discriminatory discharge on February 3, 1988. Respondent asserts that Bedell was discharged solely because he assaulted, and thereby placed in fear of bodily harm, a dock supervisor on that day.

On January 19, 1988 Bedell filed a charge of discrimination with the New Jersey Division of Civil Rights, alleging therein that Respondent has been constantly harassing him since 1986 because he "opposed" Dore in having assisted DeGrosa's claim that she had been subjected to sexual harassment. That charge was served on Respondent that same day. Bedell testified that he filed that charge after Local 641 officials had told him that they could do nothing for him until DeGrosa withdrew her claim against Dore.

On February 3, 1988 Bedell was assigned to unload 40 cartons, each weighing 24 pounds, from a truck and to bring them to another location on the shipping dock. He placed 15 of these cartons in one cart, also called a wheeler, and 11 in a second cart. He moved those carts about 15 feet away and was in the process of unloading the remaining cartons from the truck onto a third cart. When he had placed about 7 of the remaining cartons into that cart, supervisor, Joseph Smidt, came by. Smidt ordered him to consolidate the shipment of the 40 cartons in two carts, not three. Each cart weighs between about 160 pounds and 200 pounds and when loaded with 20 cartons at 24 pounds, each cart would weigh another 480 pounds.

Bedell testified that he was in the process of complying with Smidt's order in that he continued to unload the truck onto the third cart which he then would have wheeled over to the first two; he related that he, at that point would divide the contents of the third cart into the first two and walk those to the shipping location. While in the process of unloading the truck, Bedell was asked by Smidt if he was going to comply with the order he was given. Smidt told him he was disobeying a direct order. Bedell responded according to his account, by stating that he was not disobeying an order and that he (Bedell) was not a piece of shit. Bedell testified that he made that remark because of the way he was being harassed since he came to the Elizabeth terminal.

Smidt's account of this incident is that, when he asked Bedell if he intended to comply with a direct order, Bedell said in a loud voice, "No, Joe, and you're a big piece of shit."

General Counsel and Respondent called witnesses to corroborate the respective accounts of Bedell and Smidt. It is unnecessary to decide that credibility issue as Respondent asserts that Bedell was discharged because of what transpired after the exchange between Bedell and Smidt. Were it necessary to resove [sic] that credibility issue, I would credit Bedell as, for the reasons discussed below, I find that Smidt's testimony cannot be relied on.

Respondent asserts that, right after Bedell and Smidt had their discussion on February 3, Bedell's actions put Smidt in imminent fear of bodily harm and that Bedell thereby had committed a dischargeable offense as contemplated by the provisions of the collective bargaining

agreement Respondent has with Local 641. General Counsel contends that Bedell engaged in no such assault and that Respondent contrived the account in order to discharge Bedell because he had pressed DeGrosa's claim of sexual harassment and his own claim that he was also being harassed by Respondent because he had helped her.

Local 641's contract, according to a stipulation received at the hearing, provides that Respondent will not engage in any unlawful discrimination, including that based on one's sex.

In support of Respondent's contention, Respondent offered the following:

Smidt testified as follows as to what transpired after the verbal exchange he had with Bedell on February 3. Bedell came toward him with a crazed look in his eyes and with his arms moving up and down repeatedly and in an agitated manner. Smidt became terrified. He, Smidt, was aware of rumors that Bedell owned a gun and thought that Bedell might have one inside the winter clothing he had on. He, Smidt, then ran to Dore's office. Later in his testimony, Smidt related that, when he saw Bedell coming towards him, he turned and walked quickly to Dore's office.

Bedell's account as to what happened after the verbal exchange is as follows. When he told Smidt that he, Bedell, was not a piece of shit, Smidt walked away and spoke into a "walkie-talkie." Smidt asked Pete Esposito, the shift operations manager if he had heard what had transpired. Esposito was about 30 to 40 feet away. Smidt walked towards Esposito and talked with him. Esposito

had a puzzled look on his face. Smidt talked further with Esposito and then turned toward Bedell to order him to go to Dore's office because he had disobeyed a direct order and because he had assaulted him, Smidt.

Smidt, is 6 feet, 2 inches all, [sic] weighs 260 lbs., and is about 20 years younger than Bedell. Bedell is 5 feet 10 inches and weighs 170 lbs. Bedell's hair is graying and he wears thick glasses. Smidt has the following accomplishments in martial arts – national champion in Judo, East Coast Champion in Judo, and Long Island Champion in Karate.

I have considerable difficulty in accepting Smidt's testimony that he was terrified of Bedell on February 3. First, Smidt physically compared to Bedell, is immense. If he really believed that Bedell had a gun, I am certain that he would have very quickly pinned Bedell's arms to his sides should Bedell have made any effort to reach into or beneath his winter clothing to retrieve a gun. Bedell likely would have found himself swiftly disarmed and indeed, perhaps dismembered by Smidt. Secondly, it is highly unlikely that Smidt would have turned his back on Bedell and walked quickly away as he testified, if he was afraid that Bedell might shoot him. Thirdly, General Counsel's brief lists about 50 transcript references where Smidt answered, "I don't know" or "I don't remember" or "(no response)" to questions posed to him on cross-examination. For example, he testified that he could not remember if he was afraid because of the way Bedell's arms were swinging, or because of the crazed look he had said was in Bedell's eyes, or because of Bedell's physique. It seemed to me that Smidt was masking his real feeling behind a professed inability to recall why he was afraid.

Rather, I sensed from his responses that the very idea that he could be afraid of Bedell annoyed him and that he found it easier to answer that he could not recall why he was afraid. Fourthly, shift operations manager Esposito's own testimony reveals that he had no fear of Bedell's supposedly "crazed" look or of Bedell's using a gun. Esposito related that he had gone directly over to Bedell to instruct him to report to Dore's office.

Fifthly, Smidt's account that he was aware of a "rumor" that Bedell carried a gun at times is unpersuasive. Respondent presented several witnesses in an effort to establish that this "rumor" was widespread. That effort, in my judgment, was not very successful. Thus, Respondent called Robert Miller to demonstrate that, in 1987, Bedell had threatened to use a gun and had one on his person then. Miller is a Local 641 steward at another terminal and, in 1987, supported certain candidates for Local 641 offices in an intra-union election then. Bedell supported opposing candidates. Miller and Bedell gave conflicting accounts as to an argument they had then. Without belaboring the point, I do not credit Miller's testimony that Bedell, while drinking at a bar showed Miller a gun, and when he threatened to use it, Miller called Bedell a "faggot" and in effect dared Bedell to use the gun. This account strikes me as improbable. I cannot believe that Miller would have so taunted Bedell if Bedell was drinking and threatened to use a gun. Even more absurd is Miller's other testimony that Bedell acts in a "macho" manner. Bedell's personality is entirely low key. Respondent also called its director of security to testify about the rumor that Bedell carried a gun. He related that Michael Curley, Respondent's break bulk manager at the

Elizabeth terminal, asked him in January 1988 for advice as to Respondent's potential liability concerning a rumor that Bedell was alleged to be carrying a firearm and, he advised Curley that there was nothing Respondent could do as it was based on "speculation and hearsay." The director of security further testified that Curley asked him to check further as to the New Jersey penal law, and that the law confirmed his earlier advice. Such a cavalier approach to a purported concern that an employee had a gun does very little to support Smidt's account that he was afterwards terrified by Bedell's actions. In short, I find the evidence most deficient to support Respondent's effort to demonstrate that there was a rumor that Bedell carried a gun. There was no gun, there was no rumor.

G. Analysis

The credited evidence discloses that Bedell in 1986 intervened with Respondent on behalf of DeGrosa's claim of sexual harassment, that he was told by Dore that he should mind his own business and that, when he posted an advertisement relating to the problem of sexual harassment on Local 641's bulletin board later that year and also sought to learn more of Respondent's policy concerning sexual harassment as contained in its handbook, he was subjected to considerable harassment in his work – until Dore left Carlstadt in July 1987. The harassment resumed the very first day he reported to the Elizabeth terminal where Dore was terminal manager and it continued until the day he was discharged. The reason given by Respondent for discharging him is spurious.

Bedell's support of DeGrosa's claim which is a matter protected by the collective bargaining agreement, his own EEOC claim also protected by the contract and which was filed shortly before his discharge, Respondent's knowledge thereof, its relentless hostility to Bedell's actions and the pretextual reason given for Bedell's discharge make out a clear *prima facie* showing that Bedell was discharged because he supported DeGrosa's claim of sexual harassment by Dore.

General Counsel has thus met the burden imposed under *Wright Line, a Division of Wright Line Co.*, 251 NLRB 1083, 1089 (1980); the burden thereby shifted to Respondent to demonstrate that it would have taken the same action even in the absence of union activity. Respondent failed to meet this burden as, for the reasons set forth above, its asserted justification was a sham. In that regard, see *K & M Electronics, Inc.*, 283 NLRB No. 43 (March 19, 1987) and cases cited therein. Respondent simply relied on the testimony of Smidt and other witnesses to demonstrate that Bedell had acted in a threatening manner on February 3. I have discredited that testimony. Respondent had also sought to show that it had discharged two employees because of similar threats made. Suffice it to note that even that its attempt to demonstrate that Bedell was not treated in a disparate manner was badly flawed. Among other things, it appears that one of those two employees had engaged in a number of egregious acts before his employment with Respondent terminated. In any event, I need not consider the matter of disparate treatment as I have found that Bedell had not, on February 3, assaulted Smidt.

Respondent raised two collateral defenses, discussed in the next sub-sections. First, it asserts that DeGrosa was a confidential employee not protected by the Act and argues that Bedell's activity in support of her claim of sexual harassment is not protected by the Act because it was not done in concert with an employee covered by the Act. Secondly, Respondent asserts that the Board should defer to the findings of fact made by the Arbitrator; Respondent does not now assert that the Board should defer to the award itself.

H. DeGrosa's Job

Respondent's first witness in support of its contention that DeGrosa was a confidential employee was Charles Kaminski, a driver at the Carlstadt terminal and Local 641's steward there. He testified that she was Dore's private secretary and that she did work for sales manager Dave Hamlin. Local 641 represents a separate unit of about 23 clerical employees at Carlstadt. DeGrosa was not in that unit.

Dore testified for Respondent that, when he was branch manager at Carlstadt, he hired DeGrosa as a confidential secretary, that he told her she ws [sic] a confidential secretary, and that she did work for him and Hamlin. He testified that she was the only one who had access to employee personel [sic] files and that she typed all correspondence of a confidential nature concerning performance reports, evaluations, and disciplinary actions in addition to her duties involving sales.

Respondent's office manager at Carlstadt, Mary Anne Fish, was not called by Respondent to support its claim that DeGrosa was a confidential employee.

In rebuttal, DeGrosa testified for General Counsel that her job title at Carlstadt was sales secretary and dispatcher. In her EEOC chrge [sic] filed in September 1986, she asserted that she was terminated from (her) position as Secretary Dispatcher. As to her job duties, she testified that she spent four hours each day in the dispatcher's office handling the dispatcher's phone which "rang all day long", that she spent a half-hour to an hour each day handling "shift calls" from dockmen and that she spent the remainder of her workday as sales secretary dealing with salesmen, typing expense checks, preparing bills of lading, typing sales letters and accident reports and in photostating job applications for mailing to Respondent's principal office. She testified that she typed several letters that Dore gave her in longhand and that these had to do with vending machines, yard construction work and a letter on a general matter, the subject of which she did not recall. She did the filing for sales. She denied that she did any filing for Dore. She testified that the office manager of Carlstadt, Mary Anne Fish, Dore and Local 641 stewart Kaminski were the only ones who had keys to a filing cabinet in Dore's office. She states that she never attended any meetings pertaining to union-management matters and stated that Mary Anne Fish handled everything involved in the preparation of "labor-law information."

I credit DeGrosa's detailed testimony. There is no probative evidence that she was a confidential employee.

It is unnecessary to consider General Counsel's contention that Bedell's activity would still be protected even were DeGrosa a confidential employee.

I. The Arbitration Award

Respondent placed in evidence an arbitration award dated August 11, 1988 which denied Bedell's grievance that Respondent did not have "just cause under the collective bargaining agreement for (his) discharge . . . "[1] General Counsel put in evidence the opening pages of the transcript of the arbitration hearing; Respondent placed in evidence the balance.

Bedell's attorney at the arbitration hearing made it clear at the outset that he was not there to litigate any of the matters involved in Bedell's EEOC charge. The issue before me – whether Bedell was discriminated against because he assisted DeGrosa as to her EEOC charge and also filed an EEOC charge on his own behalf – was not presented to the arbitrator. In these circumstances, deferral is not warranted. See *Olin Corporation,* 268 NLRB 573 (1984).

Respondent requested that I defer to the credibility resolutions of the arbitrator. It would not be appropriate to do so as the conflicting accounts presented to me for

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[1] Respondent's post-hearing motion that I take judicial notice of a New Jersey Court decision confirming that award is granted, in order that the full record in that proceeding may be considered. That motion and General Counsel's statement of opposition are received as Administrative Law Judge Exhibit No. 4.

resolution are necessarily enmeshed with the evidence bearing on the EEOC matters. To ignore the testimony as to Bedell's aid to DeGrosa and other EEOC matters is to ignore the whole case.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2),(6) and (7) of the Act.

2. Local 641 is a labor organization as defined in Section 2(5) of the Act.

3. As General Counsel established a *prima facie* case that Bedell was discharged for discriminatory reasons, as Respondent has not rebutted that showing, as DeGrosa was not a confidential employee and as deferral to the arbitral findings is unwarranted, I conclude that Respondent, in discharging Bedell on February 3, 1988, committed an unfair labor practice proscribed by him 8(a)(1) and (3) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it hould [sic] be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Bedell, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to date of a proper offer of reinstatement, less any net

interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [sic].[2]

ORDER

The Respondent, Yellow Freight Systems, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging, refusing to reinstate, or otherwise discriminating against any employee for having engaged in concerted activities, protected by the National Labor Relations Act (Act).

(b) In any like or related manner coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Lonnie Bedell, immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of

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[2] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to his unlawful discharge and notify him in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its terminal in Elizabeth, New Jersey copies of the attached notice marked "Appendix".[3] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[3] If the Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD".

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated: Washington, D.C. May 18, 1989

/s/ James F. Morton
James F. Morton
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge, refuse to reinstate, or otherwise discriminate against any of you for engaging in concerted activities, protected by the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer LONNIE BEDELL, immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL remove from our files, and WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

YELLOW FREIGHT SYSTEMS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, Region 22, 970 Broad Street, Newark, New Jersey 07102, Telephone (201) 645-2100.

BRENNER & BRENNER, P.A.
570 Route 10, P.O. Box 14
Livingston, New Jersey 7039
(201) 533-0402
Attorneys for Defendant

LONNIE BEDELL and MERCHANDISE DRIVERS LOCAL 641 Plaintiffs, v. YELLOW FREIGHT SYSTEMS, INC., A corporation of New Jersey Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: UNION COUNTY DOCKET NO. L-103501-88 Civil Action ORDER AND JUDGMENT FILED FEB 10 1989

THIS MATTER coming on to be heard on February 3, 1989 the return date of an Order to Show Cause brought by Yauch, Peterpaul, Vitolo, attorneys for the plaintiffs requesting the Court to set aside a certain Arbitratrator's [sic] Award for the reasons set forth in the Verified Complaint and the matter being heard in the presence of Brenner & Brenner, P.A., Martin J. Brenner, Esq. Appearing, attorney for the defendant who by Counterclaim seeks to confirm the Arbitrator's Award referred to in the pleadings and the Court having considered all papers submitted on behalf of the parties and oral argument and good cause being shown it is on the 10th day of February 1989

ORDERED

(1) Plaintiff's Complaint seeking to set aside the Arbitrator's Award is dismissed with prejudice and without costs.

(2) JUDGMENT is hereby entered on defendant's Counterclaim confirming the Arbitration Award of Daniel F. Brent dated August 11, 1988.

/s/ Edward W. Beglin Jr.,
EDWARD W. BEGLIN JR.,
A.J.S.C.

STATE OF NEW JERSEY
COUNTY OF UNION

UNION COUNTY, SS.:

I, WALTER G. HALPIN, Clerk of the County of Union, aforesaid, and also Deputy Clerk of the Superior Court, of Union County, Holden therein

DO HEREBY CERTIFY, That the foregoing is a true and correct copy of a certain ORDER AND JUDGMENT

LONNIE BEDELL &
MERCHANDISE DRIVERS
LOCAL 641

vs

YELLOW FREIGHT
SYSTEMS, INC.
a Corp. of New Jersey

SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION –
UNION COUNTY
DOCKET NO. L-103501-88

as the same is taken from and compared with the original on file as of FEBRUARY 10, 1989 in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court and County, at Elizabeth, N.J. this 23rd day of Feb. 1989

SEAL

County Clerk and Deputy Clerk of the Superior Court

NEW JERSEY STATE BOARD OF MEDIATION
NEWARK, NEW JERSEY

In the Matter of the Arbitration Between
YELLOW FREIGHT SYSTEMS
and
MERCHANDISE DRIVERS LOCAL 1641 [sic]
Case No. 87-738

AWARD OF ARBITRATOR

The undersigned Arbitrator, having being [sic] designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn and having duly heard the proofs and allegations of the parties, AWARDS as follows:

Based on the evidence submitted, there was just cause under the collective bargaining agreement for the discharge of Lonnie Bedell. The record does not reflect that the grievant was subjected to disparate treatment or that the grievant's representatives were denied access to files and other documentary material relevant to the processing of the instant grievance. The instant grievance is hereby denied.

August 11, 1988

/s/ Daniel F. Brent
Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 11th day of August, 1988 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

/s/ Illegible
An Attorney of Law of the
State of New Jersey

NEW JERSEY STATE BOARD OF MEDIATION
NEWARK, NEW JERSEY

In the Matter of the Arbitration Between
YELLOW FREIGHT SYSTEMS
and
MERCHANDISE DRIVERS LOCAL 641

Case No. 87-738

Hearings are held in the above-entitled matter on June 17 and June 28, 1988, at the offices of the New Jersey State Board of Mediation in Newark, New Jersey, before Daniel F. Brent, duly designated as Arbitrator. Both parties attended these hearings, were represented by counsel, and were afforded full and equal opportunity to offer testimony under oath, to cross-examine witnesses, and to present evidence and arguments. A verbatim transcript was made of the proceedings, and the matter was declared closed on July 14, 1988.

APPEARANCES

FOR THE COMPANY

Martin J. Brenner, Esq. of Brenner and Brenner, Esqs.
Edward Nolan, Director of Labor

FOR THE UNION

Thomas P. Vitolo, Esq. of Yauch, Peterpaul, Clark and Vitolo, Esqs.

Jackie Barnes, Business Agent

George Bell, Shop Steward

ISSUE SUBMITTED

Was there just cause under the collective bargaining agreement for the discharge of Lonnie Bedell? If not, what shall be the remedy?

NATURE OF THE CASE

The grievant is employed as a dock worker at the Company's Break Bulk Terminal in Elizabeth, New Jersey. He was discharged for assaulting a supervisor in violation of Article 47, Section 2 of the collective bargaining agreement between the parties. The Union grieved the discharge, denying that any assault had occurred. The grievant argued that the enumeration of offenses justifying summary discharge, while including assault on an employer or representative during working hours, was silent with regard to a verbal assault, the misconduct underlying the imposition of discipline in the instant case. The Union also contended that, even if the grievant

had disobeyed an order to load boxes on two-hand trucks rather than three as charged, that such conduct does not justify discharge.

The Company argued that the grievant's reputation for violence, bullying, and carrying a gun was known to his supervisor. According to the Company, when the grievant approached in a manner which the supervisor interpreted as menacing, the supervisor was placed in reasonable fear of imminent bodily injury and retreated. This sequence of events was characterized by the Company as sufficient to satisfy the definition of assault embodied in the collective bargaining agreement.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was brought to arbitration.

DISCUSSION

Although the versions offered by each party of the events precipitating the discharge of the grievant differ greatly from each other, the evidence in the record establishes clearly and convincingly that the grievant used harsh language to his supervisor after having been directed to stack cartons on hand trucks in a specific manner. It is well recognized that shop talk in an industrial setting permits the use of rougher language then [sic] might be acceptable in commercial establishments or in public places. Certain expletives are commonly used as punctuation or for emphasis without the aggressive or insulting impact such words would have in another context. However, the language used by the grievant toward

his supervisor exceeded such permissible bounds because of the tone and tenor of his invective.

Although cursing at a Supervisor in the manner and circumstances of the instant grievance constitutes harassment or insubordination, such cursing alone would not constitute cause to discharge an employee. Moreover, such insubordination is not among the criteria justifying summary discharge explicitly established under the National Master Freight Agreement. However, if the grievant's physical action toward his supervisor placed the supervisor in reasonable fear of imminent hostile touching or bodily injury, then such actions – especially when viewed in combination with the loud and angry words spoken by the grievant – constituted an assault on the supervisor which would satisfy both the criteria for summary discharge expressly established by the National Master Freight Agreement and the criteria universally applied in the work place.

The credible testimony established that, after cursing at his supervisor the grievant made menacing movements towards the supervisor with raised and moving arms. The supervisor described in a straightforward, credible manner the fiendish look in the grievant's eyes, from which the supervisor concluded that the grievant was out of control. Whether an actual battery would have occurred is speculative because another employee intervened. However, the hasty retreat of the Supervisor, who is physically large and highly skilled in competitive martial arts, further corroborates the supervisor's version of the events.

The ambience of the interaction and the grievant's seething anger gave particular meaning to his aggressive advance toward the supervisor. Although the supervisor clearly could have subdued the grievant had the incident deteriorated into a hand-to-hand scuffle, the Supervisor's perception of the grievant's reputation, justified or not, combined with the supervisor's potentially lethal martial arts skills, justified his retreat to seek assistance from higher management.

The affirmative defenses offered by the grievant, while plausible, were insufficient to overcome the more persuasive evidence offered by the Company. The grievant's credibility was substantially diminished by the fact that he did not previously grieve what he characterized as unfair treatment when he was ordered to push his carts and not to use the drag line. If such a requirement was without valid basis, it would constitute harassment which could have been grieved. In addition, the grievant did not contradict the Company's version earlier in the grievance procedure on two occasions when it would be reasonable to expect him to protest vigorously. Had he been consistent in the versions he offered throughout, his credibility at the arbitration hearing may have been greater.

In summary, verbal abuse alone might not be sufficient to sustain a discharge, but the grievant's loud angry cursing at a supervisor, in combination with his aggressive approach toward his supervisor, constituted an assault. Although insubordination may not justify summary discharge, an assault on a supervisor will. The collective bargaining agreement is clear and unambiguous with regard to an assault on management, and

the Arbitrator is without authority to add or subtract from, amend, or alter the expressed language of the negotiated agreement.

Notwithstanding the fact that the grievant did not disobey a direct order, based on all of the facts and circumstances established by the evidence, there was just cause for the discharge of Lonnie Bedell. The instant grievance is hereby denied.

There was an allegation that the Union's request to see pertinent documents necessary to process the grievance was thwarted and that the grievant was subjected to disparate treatment. The Company has submitted ample proof that it has summarily discharged other employees for similar acts in the past. The record does not reflect that the grievant was subjected to disparate treatment or that the grievant's representatives were denied access to files and other documentary material relevant to the processing of the instant grievance.

August 11, 1988

/s/ Daniel F. Brent
Daniel F. Brent, Arbitrator